Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Appendices A through Z to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Note:

Exhibit attached to Affidavit of R. Dean Stahr has been omitted.

Page numbers on all original pleadings appear in brackets [] at end of the last word or sentence of said pleading.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Appendices A through Z to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Appendix A

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United States District Court
Northern District of California

Civil Action No. 74 2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, by its attorneys, alleges:

I

(a) This action arises under various laws of the United States, more particularly The Housing Act of 1949 as amended (42 U.S.C. 1441, et seq.), the Sherman Act (15 U.S.C. 1 and 2), the Clayton Act (15 U.S.C. 26), the

National Environmental Policy Act (42 U.S.C. 4321, et seq.) and the Administrative Procedure Act (5 U.S.C. 701, et seq.).

(b) The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000) dollars. (28 U.S.C. 1331.) [1]

(c) This is an action for a declaratory judgment pursuant to the provisions of 28 U.S.C. 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for injunctive relief.

II

Plaintiff, CITY OF ROHNERT PARK, is and was at all times herein material a municipal corporation, organized pursuant to Part 1 of Division 2 of the Government Code, and is situated in the County of Sonoma, State of California. Said plaintiff is hereinafter referred to as "Plaintiff City." Plaintiff City, its inhabitants, taxpayers and property owners have been injured in their business and property, and are threatened with further injury to their said business and property as the result of the acts and conduct of the defendants hereinafter named as more particularly appears hereinafter.

(a) Defendant JAMES T. LYNN is the Secretary of the United States Department of Housing and Urban Development, and is sued herein solely in his official capacity. Under the provisions of the Housing Act of 1949, said defendant may sue and be sued. The duties of this defendant, as said Secretary, are performed in the County of Sonoma by surbodinates based in the San Francisco Area office of the Department which is located in the Northern District of California. Said subordinates are and were at all times herein material acting in accordance with the

policies of said Department, not contrary thereto. They include without limitation, James H. Price, Area Director; Julian A. Fitzhugh, Program Manager, Area B, and Stephen B. Sachs, Assistant Program Manager, Area B. Said defendant is hereinafter referred to as "Defendant Secretary."

(b) Defendant CITY OF SANTA ROSA is and was at all times herein material a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions [2] of the Constitution and laws of the State of California, and is also situated in said County of Sonoma in said State. Said defendant is hereinafter referred to as "Defendant City."

(c) Defendant URBAN RENEWAL AGENCY of the City of Santa Rosa, is and was at all times herein material, a public body, corporate and politic, organized by Defendant City on or about March 28, 1958, pursuant to Part 1 of Division 24 of the Health and Safety Code of the State of California, and has its office in Defendant City. Said defendant is hereinafter referred to as "Defendant Agency."

(d) Defendant ERNEST W. HAHN, INC., is and was at all times herein material a California corporation, having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California. Said defendant is and was at all of said times engaged in the business of "shopping center developer" in said County of Sonoma as hereinafter more fully appears. Said defendant is hereinafter referred to as "Defendant Developer."

IV

(a) Defendant City is located some seven (7) miles north of Plaintiff City. The principal and most convenient means

of vehicular ingress and egress for both of said cities is United States Highway 101.

(b) On or about October 10, 1966, Plaintiff City adopted a general or master plan for the City of Rohnert Park pursuant to the requirements of Chapter 3, Title 7 of the Government Code. Said master plan, inter alia, designated certain real property within its boundaries as a site for the development of commercial facilities including a regional shopping center. Some of the real property so designated is and was at all times herein material owned by Plaintiff City. The development of this site for commercial purposes has been and will be financed entirely [3] with private capital. The site is located on both sides of U.S. Highway 101 at the Rohnert Park Expressway.

(c) On or about September 3, 1974, Plaintiff City rezoned portions of the property designated as aforesaid consistent with the requirement of Section 65860, Government Code, which requires generally that city zoning ordinances shall be consistent with the general or master plan of a city, including Plaintiff City.

(d) The purpose of Plaintiff City in designating, zoning and developing said site has been to further its proprietary interests; to increase its retail sales tax revenue, and to further the interests of its inhabitants, property owners and taxpayers.

V

(a) During the period 1966-1972, Plaintiff City spent the aggregate sum of $1,207,000 for street construction, sewer and water mains and other improvements to prepare said site for the purpose for which it was designated in its said general plan. The money required to finance this work was raised by special assessments levied on the various owners of the site.

(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged.

VI

(a) On December 5, 1961, Defendant City adopted a redevelopment plan for a redevelopment project area within its boundaries known as the Santa Rosa Center Project (California R-45). This area is immediately adjacent to U.S. Highway 101. [4] This redevelopment plan has been amended from time to time, and the last of these amendments was adopted on March 10, 1970. Defendant Agency is and has been at all times herein material vested with the responsibility for carrying out the redevelopment plan with the approval of Defendant Secretary and his subordinates. Defendant Agency, pursuant to an agreement with Defendant Developer, has been engaged since March, 1972, in a scheme to develop a regional shopping center, which is to be subsidized with federal funds. This shopping center is to occupy some thirty-two (32) acres in the downtown area of Defendant City, theretofore acquired by Defendant Agency with funds furnished by Defendant Secretary. This site had been originally destined under the redevelopment plan as last amended for land uses not compatible with such a center. Accordingly, on October 29, 1974, Defendant City purported to again amend said plan to provide for said center and at the same time approved a land disposition agreement designed to subsidize Defendant Developer, as alleged in paragraph VII, infra. No provision whatsoever

has ever been made in this redevelopment plan for permanent family housing (Housing Act of 1949, U.S.C. Title 42, Sections 1441-1441a).

(b) The said redevelopment plan initially adopted by Defendant City on or about December 5, 1961, was approved by the United States Housing and Home Finance Agency (predecessor of United States Department of Housing and Urban Development) on January 15, 1962. Thereafter and on March 9, 1962, said Housing and Home Finance Agency received an application for a Loan and Grant from Defendant Agency. Pursuant to said application, and on June 2, 1962, a loan and grant contract was entered into between Defendant Agency and said Housing and Home Finance Agency whereunder the United States was to defray three-fourths (¾) of the net costs of the redevelopment project and Defendant City was to defray by means of grants-in-aid one-fourth (¼) of the [5] said net costs of the project. This contract authorized redevelopment activities in approximately forty (40) acres of the downtown section of Defendant City. This contract provided for a Federal Temporary Loan in the sum of $4,922,616, and a Federal Project Grant of $2,625,023.

(c) The said contract has been amended eight (8) times, and all of these amendments have been for the purpose of increasing said loans and grants, so that by the last or eighth amendment, executed on November 27, 1973, the temporary loan was increased to a total of $16,557,309, and the grant to a total of $12,236,717. The sixth amendment to the contract, executed on September 14, 1970, increased the total grant from $3,263,332 to $8,318,497 (an increase of $5,055,165), and increased the temporary loan from $5,908,-880 to $13,223,939 (an increase of $7,315,059. The purpose of this amendment to said loan and grant contract was to

provide Defendant Agency with funds to acquire, as aforesaid, said thirty-two (32) acres. This action was taken after the effective date of the National Environmental Policy Act, but Defendant Secretary did not at any time prepare an Environmental Impact Statement on said redevelopment project (California R-45).

VII

Said agreement between Defendant Agency and Defendant Developer is an "exclusive" agreement, and was entered into with the knowledge and consent of Defendant Secretary. This agreement provides, *inter alia,* that Defendant Agency will sell said thirty-two (32) acres only to Defendant Developer for the sum of $2,000,000, and that Defendant Developer will build thereon a massive shopping center containing approximately 760,000 square feet of retail sales space. This acreage was acquired and cleared [6] by Defendant Agency at a cost of some $7,000,000. The fair market value of the property for the highest and best uses permitted under the redevelopment plan is approximately $12,000,000. The effect of the agreement will be therefore to subsidize Defendant Developer by the use of public funds to the extent of about $10,000,000. This phase of the agreement, if carried out, will constitute a violation of the Housing Act of 1949 and the Community Redevelopment Law of the State of California, both of which require that property in the urban renewal area be sold for its fair market value for uses in accordance with the urban renewal plan, all as set forth in 42 U.S.C. 1460(c)(4); Urban Renewal Manual Handbook 7214.1 Rev., Chapter 1, p. 1, Chapter 3, p. 9; and Health and Safety Code, Section 33433.

VIII

The facts alleged in paragraph IX hereof, infra, establish that the natural and probable consequences of this agreement when implemented as alleged in paragraph VII hereof, supra, will be the following:

(a) To enhance and render impregnable the already dominant position which Defendant City and its merchants have in the retail merchandising industry in Somona County generally and more specifically in the Santa Rosa Trade Area;

(b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;

(c) To enhance Defendant City's already large share of retail sales tax dollars collected in Sonoma County and to increase the burden of property taxes in other communities, including Plaintiff City, all to the irreparable loss or damage of [7] Plaintiff City, its inhabitants, taxpayers and property owners;

(d) To unduly restrain the trade and commerce among the states and with foreign countries.

IX

(a) A substantial part of all merchandise sold in retail outlets in Sonoma County is imported into that County from states other than California and from foreign countries.

(b) Defendant City is the hub of the Santa Rosa Trade Area and attracts trade and custom in substantial numbers from the following neighboring cities: Plaintiff City, Cloverdale, Healdsburg, Sebastopol, Cotati, Petaluma and Sonoma, as well as the unincorporated territory adjacent to these cities.

(c) Defendant City's share of total Sonoma County retail sales was in excess of forty-four percent (44%) in 1973.

(d) General merchandise taxable retail store sales (including drug stores) amounted to $70,900,000 in 1973, for Defendant City, as compared to $94,000,000 for Sonoma County as a whole.

(e) Defendant City captured in excess of seventy-five percent (75.4%) of all taxable general merchandise sales made in Sonoma County in 1973.

(f) All taxable retail sales in Defendant City in 1972 totalled $179,381,000.

(g) Retail sales tax is applicable not only to residents, but to non-residents of the community where it is levied. Thus, this tax helps broaden the tax base and contributes to relieving the local property tax burden. The following table showing sales tax distribution in Sonoma County, 1973-1974, establishes the outstanding trade and fiscal advantages now enjoyed by Defendant City and its merchants, inhabitants and taxpayers: [8]

County of Sonoma
Sales Tax Distribution

Adjusted Net Sales Tax 1973-74

	Sales Tax Dollars	Percent of Total	Increase Over Prior Year	Population Total
Cloverdale	$ 88,373	1.30%	27.19%	3,440
Cotati	90,124	1.32	23.91	2,830
Healdsburg	455,109	6.67	96.40	5,900
Petaluma	795,855	11.67	17.09	31,150
Rohnert Park	138,774	2.03	38.07	11,500
Santa Rosa	2,616,780	38.37	15.10	60,800
Sebastopol	200,616	2.94	10.90	4,480
Sonoma	187,206	2.74	11.41	4,850
Sub-Total	$4,572,837	67.05%	20.82%	124,950
Unincorporated Area	$2,247,868	32.96%	6.89%	100,450
Entire County	$6,820,705	100.00%	15.84%	225,400

Sources: State Board of Equalization
State Department of Finance

(h) There are now approximately 748,000 square feet of general merchandise space available in Defendant City. Under the terms of said agreement Defendant Developer will construct an additional 438,000 square feet of general merchandise space in the proposed shopping center, thus increasing the total of such space in Defendant City to 1,186,000 square feet. Defendant Developer will also build pursuant to said contract 322,000 square feet of other retail space in the shopping center. The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980. Hence, this publicly subsidized project will render noncompetitive and therefore impractical any project for a retail center not similarly subsidized in the proximity of Defendant City.

(i) The said contract also requires that this subsidized shopping center shall provide free offstreet parking in a [9] garage with approximately 1,250 stalls for patrons of the center. The natural and probable consequence of providing such free parking will be to induce customers to trade only at the regional shopping center of Defendant Developer and to reduce or eliminate actual or potential competition from retail merchants in surrounding communities including Plaintiff City. According to the contract the parking structure in which these stalls are to be located will be built by Defendant Developer for Defendant Agency at a cost not to exceed $2,000,000, and this cost is to be defrayed from the proceeds of the sale of not less than $4,200,000 in tax allocation bonds issued pursuant to the California Community Redevelopment Law (Health and Safety Code, Section 36670). The probable and natural consequence of this additional tax subsidy will be to divert for a period of approximately twenty (20) years the major portion of the property tax collected in the redevelopment area to pay the

principal and interest due on said bonds, and to require that the burden of the deficit thereby created be borne by other taxing authorities, including Plaintiff City. The additional tax subsidy to be so created will also serve to discourage and to make impractical any project for a retail center in the proximity of Defendant City which is not similarly subsidized.

(j) The contract also provides that Defendant Agency is to acquire and sell additional acreage in the redevelopment area to Defendant Developer. The cost of acquiring and clearing said property is $6,000,000. Under the terms of the agreement this property will be conveyed to Defendant Developer either without charge or for the sum of $1,000,000, all at the option of Defendant Agency. Plaintiff City, on information and belief, alleges that said property will be acquired with federal funds. This additional subsidy will also chill and smother any competitive project for a retail center in the proximity of Defendant City, which is not similarly subsidized. [10]

X

(a) In early September, 1973, Plaintiff City became aware of the salient features of the contract between Defendant Agency and Defendant Developer, and at about that time it also learned that Defendant Secretary had received an application from Defendant Agency requesting that its total grant be increased by an additional $1,800,000 and that its project temporary loan be also increased by an additional $1,800,000. Plaintiff City likewise learned that the purpose of this application was to procure funds to defray the costs to be incurred in implementing the contract between Defendant Agency and Defendant Developer. Realizing that this contract and its implementation would entirely frustrate its plan for a regional retail center to its injury and

that of its residents and taxpayers, Plaintiff City determined to request Defendant Secretary not to approve the land disposition provision of the contract and not to approve any further applications for federal funds. To this end, Plaintiff City on or about October 29, 1973, addressed a letter to Defendant Secretary outlining its objections to the contract and its further implementation with federal funds, and requesting an administrative hearing. A true copy of said letter is attached hereto marked Exhibit A and made a part hereof.

(b) On November 27, 1973, Defendant Secretary heedless of Plaintiff City's said letter, granted Defendant Agency's application for said additional funds.

(c) Defendant Secretary by letter dated December 27, 1973, granted Plaintiff City's request for a hearing and scheduled for this purpose an informal conference to be held on January 15, 1974. In this letter Defendant Secretary also requested that Plaintiff City's further comments be submitted in writing to one of his subordinates. A true copy of this letter is attached hereto, marked Exhibit B, and made a part hereof. On January 11, [11] 1974, and in compliance with the request of Defendant Secretary, Plaintiff City submitted a letter containing its further comments. A true copy of said letter is attached hereto, marked Exhibit C, and made a part hereof.

(d) Said informal conference was held as scheduled before said Mr. Julian A. Fitzhugh, a subordinate of Defendant Secretary. During the course of the conference the question, among others, was raised as to whether Defendant Secretary could legally continue to advance further funds to Defendant Agency without first preparing an Environmental Impact Statement, as required by The National Environmental Policy Act (42 U.S.C. Sections 3431, et

seq.). At the conclusion of the conference, the matter was submitted for decision to Defendant Secretary's said subordinate.

(e) By letter dated May 16, 1974, Defendant Secretary informed Plaintiff City, in substance, that it found its objections to the contract and its implementation entirely without merit. A true copy of this letter is attached hereto, marked Exhibit D, and made a part hereof. In said letter, Defendant Secretary, in effect, admitted that it was required to prepare an Environmental Impact Statement before making further funds available to Defendant Agency, but then went on to state ". . . the Department will still have substantial ability to eliminate or mitigate any adverse environmental effects determined during the environmental clearance process prior to approval of disposition and plan change activities, which are the activities that determine the actual reuse of project land" (Exhibit D, p. 6).

XI

(a) Defendant Secretary has not prepared said Environmental Impact Statement but has nevertheless since May, 1974, advanced additional funds to Defendant Agency in a sum in excess of $500,000. [12]

(b) Defendant Agency and Defendant City on September 24, 1974, filed an action in the Superior Court of the State of California in and for the County of Sonoma against Plaintiff City. The purpose of the action is permanently to enjoin any development of Plaintiff City's commercial site, and to this end it challenges the validity of procedures taken by the governing body of Plaintiff City to rezone portions of said site. The pleadings on file disclose that Defendant City and Defendant Agency claim, in effect, the sole and exclusive right to develop a regional

shopping center in said County, and that any erosion of this alleged right will result in "irreparable injury" to them. Said action is without merit and was brought to deter Plaintiff City from authorizing and implementing the development of its commercial site in accordance with its general plan adopted as aforesaid on October 10, 1966.

(c) Plaintiff City alleges on information and belief that the cost of said litigation is being defrayed with funds obtained by Defendant City from Defendant Secretary.

XII

All of the offenses and other conduct charged above against defendants herein, including said litigation, were in furtherance of said conspiracy in restraint of trade and of their attempt to monopolize said trade in Sonoma County, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), and said offenses and other conduct threaten irreparable loss or damage to Plaintiff City, its inhabitants, merchants, property owners and taxpayers.

WHEREFORE, Plaintiff City prays for judgment as follows:

1. A declaration that the sale of land to Defendant Developer by Defendant Agency at less than the fair market value of the land for its highest and best uses permitted under the urban renewal plan of Defendant City is illegal and in violation [13] of 42 U.S.C 1460(c)(4) and Section 33433, Health and Safety Code;

2. A declaration that Defendant Secretary is acting illegally and in excess of his authority in approving the agreement between Defendant Agency and Defendant Developer for disposition of said land to the latter;

3. A declaration that the issuance by Defendant Agency of tax allocation bonds to finance construction of all or any

part of the urban renewal project in accordance with said agreement will cause irreparable damage to the various taxing agencies of Sonoma County, including Plaintiff City;

4. A declaration that Defendant Secretary has acted and continues to act illegally and in excess of his authority in approving payments of public funds to Defendant Agency without an Environmental Impact Statement pursuant to the provisions of The National Environmental Policy Act;

5. A declaration that Defendant Secretary has acted and continues to act illegally and in excess of his authority in approving payments of public funds to Defendant Agency without first ascertaining that action and conduct of Defendant Agency and Defendant City complies in all respects with the laws of the State of California;

6. A declaration that the agreement between Defendant Agency and Defendant Developer, if carried out, represents a combination and conspiracy in unreasonable restraint of interstate trade or commerce in Sonoma County;

7. A declaration that the agreement between Defendant Agency and Defendant Developer, if carried out, represent an attempt to monopolize, or a combination or conspiracy to monopolize interstate trade or commerce in Sonoma County or some part thereof;

8. A declaration that Plaintiff City, its inhabitants, merchants, property owners and taxpayers are threatened with loss or damage by violations of the antitrust laws, which loss or [14] damage greatly exceeds the sum of $1,207,000;

9. A declaration that Plaintiff City is entitled to sue for and have injunctive relief against said threatened loss

or damage by the violations of the antitrust laws and the Housing Act of 1949;

10. Plaintiff City further prays for an injunction permanently restraining:

(a) Defendant Secretary or any of his subordinates from approving the land disposition agreement between Defendant Agency and Defendant Developer;

(b) Defendant Agency from selling, transferring or otherwise disposing of all land covered by and described in the disposition agreement with Defendant Developer to said defendant, its successors, heirs and assigns;

(c) Defendant Agency from selling, transferring or otherwise disposing of all land acquired or to be acquired by it for sale, transfer or other disposition to Defendant Developer for use by it in connection with or as part of the regional shopping center contemplated by Defendant Developer;

(d) Defendant City from taking any action of any kind whatsoever, including without limitation, the exercise of its powers of eminent domain to condemn or otherwise acquire any real property with public funds for eventual resale to Defendant Developer;

(e) Defendant Secretary, Defendant City and Defendant Agency from taking any further action of any kind whatsoever, including without limitation, authorizing or issuing any obligations, securities or notes by Defendant Agency which are guaranteed by Defendant Secretary, until or unless said Defendant Secretary first complies with all requirements of The National Environmental Policy Act;

(f) Defendant Secretary from authorizing the [15] payment, either by loan, grant or guaranty of any further public funds to Defendant Agency until or unless said Defendant Secretary first complies with all requirements of The National Environmental Policy Act;

(g) Defendant Secretary from authorizing, approving or taking any action whatsoever without first complying with The National Housing Act—42 U.S.C. 1460(c)(4)—and the California Community Redevelopment Law; Section 33433, Health and Safety Code;

(h) Defendant Secretary, Defendant City and Defendant Agency from taking any action of any kind whatsoever the effect of which will cause or threaten irreparable loss or damage to Plaintiff City by reason of any violation of the antitrust laws of the United States—15 U.S.C. 1, 2 and the Housing Act of 1949.

11. Plaintiff City further prays for judgment awarding it all costs sustained by it in bringing this action, including without limitation, reasonable attorneys' fees.

12. Plaintiff further prays for such other relief as is proper in the premises.

Dated: November 19, 1974.

WILLIAM M. BRINTON
RICARDO J. HECHT

By WILLIAM M. BRINTON

Of Counsel
COTTON, SELIGMAN & RAY [16]

EXHIBIT A

October 29, 1973

Mr. James H. Price, Area Director
Department of Housing & Urban Development
One Embarcadero Center, Suit 1600
San Francisco, California 94111

RE: SANTA ROSA CENTER PROJECT
(CALIFORNIA R 45)

ADMINISTRATIVE COMPLAINT

Dear Mr. Price:

We represent the City of Rohnert Park, a city organized and existing under and by virtue of the laws of the State of California. Rohnert Park is situated in the County of Sonoma, in said State, some seven miles south of the City of Santa Rosa.

Reference is hereby made to the application for amended Loan and Grant Contract for Santa Rosa Center Project No. 1 (Calif. R. 45) filed in the San Francisco area office of the Department of Housing and Urban Development. This application was filed by the Urban Renewal Agency of the City of Santa Rosa, a public agency designated by the City of Santa Rosa to carry out the functions, objectives, duties and purposes of the Santa Rosa Urban Renewal Project. Under this [1] application, said Agency seeks to obtain additional financing from the Department in the amount of two million dollars ($2,000,000) for said Project. This additional grant is to be used to finance a downtown regional shopping center which is to be built and developed by Mr. Ernest W. Hahn, a private developer. As part of the scheme to finance the construction of said center, the Agency will authorize the issuance of *tax* allocation bonds. These bonds, it has been estimated, will be paid off in approximately ten (10) years. The said center is to be built on land to be acquired by the Agency in the exercise of the power of eminent domain. This land, when acquired and cleared, will be sold to Mr. Hahn at a substantial discount from the cost of acquisition to the Agency. Thus, it can be seen that the Agency plans to subsidize a private developer in the building of this center by the use of federal and local tax money.

Mr. James K. Burns is and has been for some years past, the Executive Director and Secretary of the Agency. On or about September 23, 1973, Mr. Burns publicly announced that the Department would on or about March 10, 1974, give its final approval to said Project and that thereupon said additional [2] federal financing would become available.

The implementation of this Project through the Department's approval and by the use of federal and local tax funds will cause our client, and its residents and taxpayers great economic injury, measurable in the hundreds of thousands of dollars. The following is a brief outline of the factors that indicate that such economic injury is reasonably certain to ensue if said Project is thus implemented.

1. Our client has planned a regional shopping center which is to be developed with private capital, and which is not to be subsidized by federal, state or local tax moneys. Obviously, our client's project cannot compete with one that is to be funded with public money, and accordingly, our client will not only lose what it has invested in the planned project, but will also be deprived of the tax revenue that its project might have generated when made effective.
2. (a) All the land included in the Agency's Project in Santa Rosa has been frozen at its current [3] de-

pressed assessed valuation. All of the increased property taxes generated by the shopping center to be developed by Mr. Hahn will be pledged to pay for parking garages and other improvements benefitting the shopping center. Thus, while the tax allocation bonds remain unpaid as to interest and principal (approximately ten (10) years), neither Sonoma County nor the local school districts will receive the benefit of the increased taxes to be generated by the center, as these will all be ploughed back into it.

(b) Moreover, the development of this center, as the evidence will show, will require the use of at least fifteen million ($15,000,000) dollars of federal tax money. Additionally, the increased property and other taxes to be thereby created, estimated at approximately two million ($2,000,000) dollars *per year* will, as the evidence will also show, be used for the benefit of the Project *alone*. This sum is in effect diverted tax money which [4] will have to be made up by all taxpayers in the County, including each and every taxpayer in the City of Rohnert Park. Also, this Project will evitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money in Rohnert Park or elsewhere in the County.

3. On June 11, 1973, the Urban Renewal Agency adopted a resolution of intention. It declared its intention to sell one million, eight hundred thousand ($1,800,000) dollars in tax allocation bonds, the proceeds of which are intended to be used to provide public parking for the purpose of providing the local share of project costs for Project R-45. This

resolution is not sufficient on its face to support any grant whatsoever from the United States Department of Housing and Urban Development. See Urban Renewal Handbok (REM 7216.1).

In connection with all the foregoing, we would like to call your attention to an anomaly that should not be over- [5] looked. In 1972, our client obtained from the United States Economic Development Administration a grant for fifty (50%) percent of the cost of a freeway overpass at the Rohnert Park Expressway (total cost, $800,000). In order to obtain this grant our client was required to demonstrate that as a result of the construction of this overpass, the community would be able to generate additional jobs through the development of neighboring commercially designated property including a *planned regional shopping center* which was to be built as stated above, with *private capital*. Clearly, the grant that the Department may accord to the Santa Rosa Project will entirely defeat the objective sought to be achieved by the Economic Development Administration when it made its grant to our client. We submit that agencies of the United States should not work at cross-purposes.

When Congress enacted the Housing Act of 1949, it commanded that the Department of Housing and Urban Development should exercise its powers so as to encourage and assist the production of *housing* of sound standards, and while so doing, it declared that this objective should be attained whenever possible through private enterprise (42 U.S.C.A. [6] Section 1441). Santa Rosa Center Project No. 1 (Calif. R.45) has nothing to do with either *housing or private enterprise.*

Please consider this letter as an "administrative complaint" opposing said project in its present form, and the Department is hereby requested to hold a hearing in connection therewith at which our client may submit oral and documentary evidence in support thereof.

Sincerely,

COTTON, SELIGMAN & RAY

By .....
William M. Brinton

cc: Mr. James K. Burns

EXHIBIT B

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

SAN FRANCISCO AREA OFFICE
ONE EMBARCADERO CENTER, SUITE 1600
SAN FRANCISCO, CALIFORNIA 94111

REGION IX
450 Golden Gate Avenue
P.O. Box 36003
San Francisco, California 94102

IN REPLY REFER TO:

Dec 27 1973

Mr. William M. Brinton
Cotton, Seligman and Ray
1 MaritimePlaza
San Francisco, California 94111

Dear Mr. Brinton:

This is in response to your request for an "administrative hearing" concerning the Santa Rosa Center Project No. Calif. R-45.

Neither the Administrative Procedures Act, nor any of the program statutes under which the Department of Housing and Urban Development functions provides for the processing of an "administrative complaint" or the holding of an administrative hearing in connection with any application. The Department, however, does consider complaints by interested parties before it acts on matters which come before it.

In accordance with this policy, the Department has scheduled an informal conference for January 15, 1974 at 9:00 A.M. to receive any comments you and your clients may wish to present concerning Project No. Calif. R-45. You should submit your comments in writing to Julian Fitz-

hugh, Program Manager, Area B, by January 11, 1974. At the meeting you will then be given an opportunity to discuss those points with my staff and you will be informed at a later date of our decision on the matters raised.

The meeting will be held at One Embarcadero Center, Sacramento at Battery Streets, San Francisco, on the Seventeenth Floor. If you are unable to attend at the scheduled time, please call Mr. Fitzhugh to try to arrange a mutually acceptable meeting time.

Sincerely,

JAMES H. PRICE
James H. Price
Area Director

April 1973
5th Anniversary U.S. Fair Housing Law
Support It—Work For It

January 11, 1974

Mr. Julian Fitzhugh, Program Manager
San Francisco Area Office, Area E
Department of Housing and Urban Development
One Embarcadero Center, Suite 1600
San Francisco, California 94111

RE: SANTA ROSA CENTER PROJECT
(CALIFORNIA R-45)
ADMINISTRATIVE COMPLAINT

Dear Mr. Fitzhugh:

We represent the City of Rohnert Park.

On October 29, 1973, we mailed to Mr. James Price, Area Director of the Department of Housing and Urban Development, an administrative complaint on behalf of our client concerning Santa Rosa Center Project No. Calif. R-45.

This complaint appears to have been received in Mr. Price's office on October 30, 1973. In it we manifested our client's opposition to an application for an amended Loan and Grant for said project filed with the Department by the Urban Renewal Agency of the City of Santa Rosa whereby the Agency sought additional financing in the approximate amount of $2,000,000 to subsidize the construction and development of a downtown regional shopping center which was to be built by a private developer. The reasons underlying our client's opposition to the application were set forth in detail in the complaint.

Mr. Price responded to this complaint by letter dated *December 27, 1973.* In this letter Mr. Price stated, inter alia, "The Department, however, does consider complaints by interested parties *before it acts on matters which come before it.*" (Emphasis added.) On January 8, 1974, we learned for the first time that the Department had on *November 23, 1973,* [1] approved the application of the Santa Rosa Agency to the extent of $1,800,000.

In his letter Mr. Price informed us, in effect, that pursuant to our complaint he had scheduled an informal conference for January 15, 1974, at 9:00 a.m. to receive any comments we might wish to present concerning said Project No. Calif. R-45. In this connection, Mr. Price directed in his letter that we submit our comments *to you* in writing by January 11, 1974.

Preliminarily we submit to you as part of this written commentary a copy of the said administrative complaint mailed as aforesaid to Mr. Price on October 29, 1973. Please note that a copy of this complaint was mailed to Mr. James K. Burns, the Executive Director and Secretary

of the Urban Renewal Agency of the City of Santa Rosa. We request, therefore, that any written comments which Mr. Burns may have addressed to the Department with respect to our complaint be made available to us at said conference.

At pages 1-3 of our complaint, we state in substance, that our client has conceived a plan to develop a regional shopping center with *private capital,* and that this plan will be brought to naught if the Department grants to the Santa Rosa Agency *tax money* in the approximate sum of $2,000,000 to finance a competing regional shopping center in downtown Santa Rosa which is to be built and developed as aforesaid by a private developer. With respect to this we said, in part, the following in our complaint:

> ". . . Obviously, our client's project cannot compete with one that is to be funded with public money and accordingly, our client will not only lose what it has invested in the planned project, but also will be *deprived of the tax revenue that its project might have generated when made effective.*" (Emphasis added.)

We have attached hereto marked Exhibit A, a schedule [2] showing the tax revenue that our client might derive from its shopping center, but for the subsidy which the Department intends to grant to a private developer at the behest of the Santa Rosa Agency. Moreover, if the Department does in fact grant this subsidy to this developer, the tax revenue will inevitably inure to the benefit of the City of Santa Rosa.

In our complaint we also call attention to the fact that as part of the scheme to finance this downtown Santa Rosa shopping center, the Santa Rosa Agency will authorize the issuance and sale of *tax allocation* bonds, and that this mode of financing will affect every taxing agency and every

taxpayer in the County of Sonoma. In this complaint we likewise show that the Santa Rosa Project will inevitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money elsewhere in the County. (Complaint, p. 1); paragraphs 2(a) and (b), pp. 3-5.)

For the purpose of intelligently discussing our contentions at the conference with Mr. Price's staff, we will use the tax data which is contained in the following schedules:

1. County of Sonoma Assessed Valuations;
2. Approximate Property Tax Receipts;
3. Sales Tax Distribution.

Copies of these schedules are enclosed for your use.

The Redevelopment Plan *approved* by the City Council of Santa Rosa which is the cornerstone of the Loan and Capital Grant Contract, as amended from time to time, between the Urban Renewal Agency of Santa Rosa and the Department *does not* provide for a downtown regional shopping center. This *approved* plan has been, in effect, abandoned by the Santa Rosa Agency in favor of a new and radically different plan providing for such a center. We are informed that the new and different plan has not received the sanction and approval of either the City Council or the Department. We believe, therefore, that [3] the approval given by the Department to the application for additional financing to subsidize the construction and development of this shopping center is violative of the Housing Act of 1949 [42 U.S.C.A. Sec. 1455(h)].

In our complaint we point out that Congress in enacting the Housing Act of 1949 declared that the Department of Housing and Urban Development should exercise its powers so as to encourage the production of housing and that this objective should be attained whenever possible through

private enterprise (42 U.S.C.A. Sec. 1441). There, we also pointed out that the Santa Rosa shopping center project has nothing to do with either *housing* or *private enterprise.* Accordingly, we submit that the provisions of the Housing Act should be strictly and narrowly construed when applied in connection with the commercial enterprise now being sponsored by the Santa Rosa Agency.

Sincerely,

COTTON, SELIGMAN & RAY

By

RJH
rrj
Enclosures [4]

EXHIBIT A

ESTIMATE OF REVENUE THAT ROHNERT PARK WOULD REALIZE FROM AN UNSUBSIDIZED REGIONAL SHOPPING CENTER DEVELOPED *WITH PRIVATE CAPITAL ALONE.*

I. *Property Taxes*

Assuming a $30,000,000 market value development, which is conservative, this would create an assessed valuation of $7,500,000.

At Rohnert Park's 1973-74 tax rate of $1.57 this would raise in annual property tax revenues for Rohnert Park $117,000

II. *Sales Tax*

750,000 sq. ft. at 75¢ per S/F = $560,000

RECAP OF ESTIMATED REVENUES

Annual City Property Tax	$117,000
Annual Sales Tax	560,000
	$677,000

Note: This does not include other revenues that would be realized such as from business licenses, water and sewer service charges, etc. Also the amount of cigarette tax that the City receives from the the State is partially based on sales tax receipts so that the amount of cigarette taxes the City would receive will also be affected. [1]

COUNTY OF SONOMA

Assessed Valuations

	Assessed(1) Value 1973-74	Sonoma(2) County Population	Assessed Value per Capita	Rank on Per Capita Basis
Cloverdale	$ 5,929,080	3,430	$1,729	9
Cotati	5,387,244	2,500	2,154	7
Healdsburg	13,524,828	5,775	2,342	5
Petaluma	68,547,389	30,650	2,236	6
Rohnert Park	18,288,364	9,725	1,880	8
Santa Rosa	185,833,548	60,700	3,061	3
Sebastopol	12,111,203	4,340	2,790	4
Sonoma	15,452,273	4,790	3,226	2
Sub-Totals	$325,073,929	121,910	$2,666	
Unincorporated Area	$377,631,305	108,790	$3,471	1
Entire County	$702,705,234	230,700	$3,046	

(1) Sonoma County Assessor's Report on 1973-74 Assessed Values issued September, 1973.

(2) Population Figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of April, 1973 as established for SB-90. [2]

COUNTY OF SONOMA

Assessed Valuations

	Assessed(1) Value 1972-73	Sonoma(2) County Population	Assessed Value per Capita	Rank on Per Capita Basis
Cloverdale	$ 5,419,356	3,440	$1,575	9
Cotati	3,702,143	1,650	2,244	6
Healdsburg	13,051,012	5,700	2,290	5
Petaluma	62,385,506	29,500	2,115	7
Rohnert Park	12,288,533	7,450	1,649	8
Santa Rosa	159,777,312	57,300	2,788	3
Sebastopol	10,939,854	4,140	2,642	4
Sonoma	13,771,638	4,850	2,839	2
Sub-Totals	$281,335,354	114,030	$2,467	
Unincorporated Area	$343,092,543	108,570	$3,160	1
Entire County	$624,427,897	222,600	$2,805	

(1) Sonoma County Assessor's Report on 1972-73 Assessed Values Issued September 19, 1972.

(2) Population Figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of February 1, 1972 [2a]

APPROXIMATE PROPERTY TAX RECEIPTS

	Agency	Fiscal Yr. 1971-72	Fiscal Yr. 1972-73
1.	Sonoma County	$19,540,000	$20,270,000(a)
2.	Sonoma County Water Agency	650,150	792,690(a)
3.	Santa Rosa Jr. College District	3,007,000	3,413,000(a)
4.	Santa Rosa School District	1,397,000	1,635,000(a)
5.	Sonoma County Schools Service	1,169,000	1,264,000(a)
6.	City of Rohnert Park	164,000	208,000(b)
7.	Petaluma High School District	2,500,000	3,160,000(c)
8.	Cotati-Rohnert Park School Dist.	465,000	567,000(d)
9.	Petaluma Hospital District	30,000	2,000(a)
10.	Coyote Valley Dam	184,000	174,127

Source: (a) Sonoma County Auditor's Office; (b) Rohnert Park City records; (c) Petaluma High School District office; (d) Cotati-Rohnert Park School District office. [3]

COUNTY OF SONOMA

Sales Tax Distribution

	Adjusted(1) Net Sales Tax 1972-73	Sonoma(2) County Population	Sales Tax Per Capita	Rank on Per Capita Basis
Cloverdale	$ 69,520	3,430	$20.27	7
Cotati	72,731	2,500	29.09	5
Healdsburg	231,726	5,775	40.13	2
Petaluma	679,714	30,650	22.18	6
Rohnert Park	100,511	9,725	10.36	9
Santa Rosa	2,273,447	60,700	37.45	3
Sebastopol	180,901	4,340	41.68	1
Sonoma	168,026	4,790	35.08	4
Sub-Total	$3,776,576	121,910	$30.99	
Unincorporated Area	$2,103,050	108,790	$19.38	8
Entire County	$5,879,626	230,700	$25.49	

Based on 1973-74 Budget

Rohnert Park	$ 105,000	9,725	$10.80

(1) Net Sales Tax Figures were furnished by the State Board of Equalization, State of California, per telephone call on June 22, 1973 and include fiscal year allocation of sales tax paid on taxable transactions in the four quarters of 1972-73 fiscal year.

(2) Population figures were furnished by the Department of Finance, Population Research Unit, State of California, and are based on their figures as of April, 1973 as established for SB-90. [1]

EXHIBIT D

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAN FRANCISCO AREA OFFICE
ONE EMBARCADERO CENTER, SUITE 1600
SAN FRANCISCO, CALIFORNIA 94111

REGION IX
450 Golden Gate Avenue
P.O. Box 36003
San Francisco, California 94102

IN REPLY REFER TO:
9.1G

May 16 1974

Mr. William Brinton
Cotton, Seligman & Ray
One Maritime Plaza
San Francisco, California 94111

Dear Mr. Brinton:

This is in reply to your letters of October 29, 1973 and January 11, 1974 and your comments at the informal conference of January 15, 1974 concerning the Santa Rosa Center Project, No. Calif. R-45.

Your first point in your letter of October 29, 1973 is as follows:

1. Our client has planned a regional shopping center which is to be developed with private capital, and which is not to be subsidized by federal, state or local tax moneys. Obviously, our client's project cannot compete with one that is to be funded with public money, and accordingly, our client will not only lose what it has invested in the planned project, but will also be deprived of the tax revenue that its project might have generated when made effective.

It is our understanding that you represent the local government of the City of Rohnert Park. If no local tax money has been or is to be used to develop or make possible a regional shopping center in Rohnert Park, we fail to see how your client, Rohnert Park, can have invested any money in this project since cities raise the money which they spend through taxes.

Nevertheless, the question of any possible loss of tax revenue by Rohnert Park is a question of state and local law. The State of California has chosen to pass its Community Redevelopment Law, California Health and Safety Code, §§ 33000 et seq., and the City of Santa Rosa has chosen to undertake a redevelopment project pursuant to that law. The tax consequences of these actions were arranged by the California state government, and HUD has no power or desire to interfere with the state tax system. [1]

The second point of your letter of October 29, 1973 is as follows:

2. (a) All the land included in the Agency's Project in Santa Rosa has been frozen at its current depressed assessed valuation. All of the increased property taxes generated by the shopping center to be developed by Mr. Hahn will be pledged to pay for parking garages and other improvements benefitting the shopping center. Thus, while the tax allocation bonds remain unpaid as to interest and principal (approximately ten (10) years), neither Sonoma County nor the local school districts will receive the benefit of the increased taxes to be generated by the center, as these will all be ploughed back into it.

   (b) Moreover, the development of this center, as the evidence will show, will require the use of at

least fifteen million ($15,000,000) dollars of federal tax money. Additionally, the increased property and other taxes to be thereby created, estimated at approximately two million ($2,000,000) dollars *per year* will, as the evidence will also show, be used for the benefit of the Project *alone*. This sum is in effect diverted tax money which will have to be made up by the taxpayers in the County, including each and every taxpayer in the City of Rohnert Park. Also, this Project will evitably divert retail sales tax producers into Santa Rosa who otherwise might have spent their money in Rohnert Park or elsewhere in the County.

Once again, you are challenging the provisions of state law. HUD cannot change those provisions and therefore has no power to change the circumstances of which you complain.

Your third point of your letter of October 29, 1973 is as follows:

3. On June 11, 1973, the Urban Renewal Agency adopted a resolution of intention. It declared its intention to sell one million, eight hundred thousand ($1,800,000) dollars in tax allocation bonds the proceeds of which are intended to be used to provide public parking for the purpose of providing the local share of project costs for Project R-45. This resolution is not sufficient on its face to support any grant whatsoever from the United States Department of Housing and Urban Development. See Urban Renewal Handbook (RHM 7216.1). [2]

The Department of Housing and Urban Development has not relied on a resolution of intention of the Local Agency.

The City and Redevelopment Agency have agreed to provide the local share of Project Calif. R-45, by adopting a Cooperation Agreement which supports the total amount of loan and grant funds committed to the Santa Rosa Agency under Contract No. Calif. R-45(LG), as amended. Such a Cooperation Agreement is the assurance of local share required by the Urban Renewal Handbook, RHM 7216.1.

You also point out the Economic Development Administration granted $400,000 to Rohnert Park in 1972 for construction of a freeway overpass. At the time the EDA grant was made, Santa Rosa's renewal project had been in progress for a number of years. If you feel the EDA spent its money unwisely in trying to divert growth from Santa Rosa where HUD's project was underway, you should take your complaint to them. HUD has aided Santa Rosa's redevelopment program since the early 1960s and sees no reason to terminate its aid because of EDA's later action.

In reference to your last point in your letter of October 29, 1973, § 110 of the Housing Act of 1949, as amended permits nonresidential renewal projects if the Local Agency determines that such redevelopment is necessary. Thus the determination of the Santa Rosa Renewal Agency to redevelop a nonresidential project must be accepted by the Department of Housing and Urban Development. The land for the shopping center will be bought, developed, and owned by a private corporation, thus demonstrating the incorrectness of your assertion that private enterprise will not be involved.

In your letter of January 11, 1974 you again raised the points concerning state tax law and the question of housing and private enterprise in the renewal project. Those points have been answered above.

In our discussion of January 15, 1974, you first contended that the Santa Rosa Renewal Agency had not adequately guaranteed its local share to support the project. As stated above, the amended Cooperation Agreement is adequate under the terms of the Urban Renewal Handbook to guarantee the local share of the project. [3]

You also challenged the validity of the Cooperation Agreement as a matter of state law, claiming it violated the provisions of Article XIII, Section 40 of the California Constitution since it had not been approved by a two-thirds vote of the voters of Santa Rosa.

In the Cooperation Agreement, as amended, the City has agreed to make up any deficiencies in the financing of the local share if the Redevelopment Agency is unable to provide the local share through its own efforts to finance the required improvements. This liability of the City is contingent on failure of the Agency to provide the local share. At the present time its amount is uncertain, as is the time at which it might become due. Such a contingent obligation does not become a debt until the contingency occurs. *McBean v. City of Fresno* 112 Cal. 159, 168 (1896); Ops. Atty. Gen. 21 (January 10, 1952).

The Cooperation Agreement provides that the City may pay any deficiencies that may arise eventually from its contingent liability "from whatever source it may legally do so." Certain methods of financing, such as issuance of revenue bonds, could be used to pay the debt if it arises and such bonds are not an indebtedness within the meaning of Article XIII, Section 40 of the California Constitution—*City of Santa Clara v. Von Raesfield* 3 Cal. 3rd 239, 247 (1970).

The Department of Housing and Urban Development therefore accepts the Cooperation Agreement as creating a

valid contingent liability on the City of Santa Rosa under the procedures by which the City and Redevelopment Agency have adopted it.

Your second point again challenged the tax provisions of California law. You are referred to our above answer on the same subject.

Your third contention was that the amendment to the Redevelopment Plan in 1970 was not valid because the City did not make a finding that the project was economically feasible as required by Section 33367 of the California Health and Safety Code.

Section 33367 applies to initial adoption of a plan. Amendments to a plan are governed by Sections 33450-33458, and no such finding is required under those sections. Therefore the amendment is not invalid. [4]

Your fourth contention was that Santa Rosa was not proceeding in accordance with its adopted and amended Urban Renewal Plan.

The Urban Renewal Plan for Calif. R-45, as amended, permits the land to be used for commercial facilities such as those which will make up the proposed shopping center.

Section C, Land Use Plan, provides for three Central Business land use zones: Central Business "C", Central Business "D", and Central Business "E". Each of these land use areas permits among other uses, retail stores; personal and business service establishments; restaurants and other places serving food and drink; and public and private parking lots. None of the uses included in the proposed shopping center are in conflict with the permitted land uses of the Urban Renewal Plan.

The plan does not need to be amended to allow the use of project land for a shopping center. Thus this contention is also without merit.

Your fourth point also raises a contention of possible fraud with respect to the issuance of tax allocation bonds by the Agency. This is a question for bond counsel and need not concern HUD, since HUD relies on the Cooperation Agreement's pledge to provide the local share from any legal source. Thus if one method were to be foreclosed, the City and Agency could provide the local share by another means.

You also contend that the Urban Renewal Plan is not in conformance with the City's General Plan and Central District Development Plan.

There is no language in either plan which forbids development of a Regional Shopping Center. The documents were prepared six years ago, before the Urban Renewal Plan was amended and were designed to allow for subsequent changes in specific land uses.

There is no indication that the Planning Commission of the City of Santa Rosa commented that the amended Renewal Plan would conflict with the general plan. Under Section 33455 of the Health and Safety Code, a lack of adverse comment by the commission is all that is required. Thus the plan has been validly amended and your assertions are incorrect.

Your fifth contention is again that the local share has not been adequately provided. You are hereby referred to our earlier answer on this same issue. [5]

If the Clean Air Act were to prevent the building of a garage, the Agency and City would be bound to provide the local share by some other means under the terms of the Cooperation Agreement.

Your sixth contention merely restates your concern that in 1972 the EDA granted your client, the City of Rohnert Park, $400,000 to build a freeway underpass, and that such

grant promoted a policy that worked counter to the purposes of a renewal grant and loan program to Santa Rosa that HUD had already been funding for a number of years. Once again you are referred to our earlier answer on this point.

Your seventh and final contention is that HUD is in violation of the National Environmental Policy Act because it has not completed an Environmental Impact Statement on the Santa Rosa Center Project No. Calif. R-45.

In compliance with the National Environmental Policy Act the Department of Housing and Urban Development is preparing an Environmental Impact Statement on the Santa Rosa Center, Project Calif. R-45. A group of technical and administrative staff members, with expertise in all areas of environmental and program concerns have formed an Environmental Task Force to prepare the statement. The Task Force received the Applicant's Environmental Information form, completed by the Santa Rosa Agency, in March of 1974, and at the present time the Task Force is in the process of evaluating this information and preparing an Environmental Impact Statement.

On April 4, 1974 the Department of Housing and Urban Development received an application from the Santa Rosa Redevelopment Agency requesting an increase in both the loan and grant in the amount of $435,868 for a total loan of $16,933,177 and a total grant of $11,356,599. The purpose of this request is to provide funds to pay the interest costs involved in refinancing the project notes through the completion of the project. Processing of this application is presently being undertaken.

The project notes finance acquisition and site preparation activities but not the development of structures on the site. Thus refinancing of project notes or providing more

money for interest costs on the notes will do nothing to further one particular reuse plan over any other; the Department of HUD will still have substantial ability to eliminate or mitigate any adverse environmental effects determined during the environmental clearance process prior to approval of disposition and plan change activities, which are the activities that determine the actual reuse of project land.

The Department of Housing and Urban Development is also processing a land disposition contract which the Santa Rosa Redevelopment Agency [6] has submitted for its approval and it is anticipated that the Redevelopment Agency will request HUD to approve a further Amendment to the Redevelopment Plan. The Department of HUD will not approve any further land disposition contracts or plan changes for the proposed shopping center use or for any other use in the 31.2 acre area added by the 1970 Contract and Plan Amendments until an Environmental Impact Statement has been prepared in accordance with the National Environmental Policy Act.

In conclusion, we have reviewed all of your contentions in your letter of October 29, 1973 and January 11, 1974 and at the informal conference of January 15, 1974. As stated above, certain HUD actions will not be taken until an Environmental Impact Statement is completed on the Santa Rosa Center Project. We have discussed your other complaints and contentions above and have found each of them to be without merit. We therefore find that you have raised no issues which will cause us to halt or delay any activities of the U.S. Department of Housing and Urban Development or the Santa Rosa Renewal Agency with respect to the Santa Rosa Center Project No. Calif. R-45, except those

outlined above as being delayed until completion of the Environmental Impact Statement.

Sincerely,

STEVEN B. SACHS
for Julian A. Fitzhugh
Program Manager, Area B [7]

Appendix B

JAMES L. BROWNING, JR.
United States Attorney
PAUL E. LOCKE
Assistant United States Attorney
16th Floor Federal Building—Box 36055
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-5134

Attorneys for Defendant James T. Lynn

United States District Court for the Northern District of California

CIVIL NO. C-74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF JAMES T. LYNN AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

JAMES T. LYNN, Secretary of the United States Department of Housing and Urban Development, defendant herein, by his undersigned attorneys answer the complaint on file herein as follows:

I

Defendant denies each and every allegation in Paragraph I of the Complaint.

II

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first paragraph of Paragraph II of the Complaint and therefore denies same.

(a), (b) and (c). Defendant admits the allegations of subparagraphs (a), (b), and (c) of said Paragraph II.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph II(d) of the Complaint and therefore denies same. [1]

III

There is no Paragraph III in the Complaint.

IV

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IV and therefore denies same.

V

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph V and therefore denies same.

VI

(a) Defendant answers Paragraph VI(a) as follows: Defendant admits the allegations set forth on Page 4, Line 29 to Page 5 to the first period on Line 6. Defendant admits the allegation that there is no plan for permanent family housing; however, alleges that there is no requirement therefor. Defendant denies each and every other allegation in said Paragraph VI(a).

(b) Defendant denies that part of Paragraph VI(b) alleging the United States will defray three-fourths of the net costs of the project, on the contrary the United States will defray three-fourths of the net "eligible" costs not to exceed the amount in the Loan Grant Contract. In all other respects, the defendant admits the substantial truth of said subparagraph except that the loan and grant contract was entered on June 6, 1962.

(c) Defendant admits that the contract was amended at least eight (8) times as alleged in Paragraph VI(c) and defendant alleges that he is now in the process of preparing an Environmental Impact Statement.

VII

Defendant denies the first sentence of Paragraph VII of the Complaint and as to the remainder of said paragraph Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations as pleaded therein and therefore denies same. [2]

VIII

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VIII and therefore denies same.

IX

(a-i) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IX (a) through (i) and therefore denies same.

(j) Defendant denies the allegations of Paragraph IX(j) on the basis that no federal funds are involved.

X

(a) Defendant admits that portion of the allegation of Paragraph X(a) commencing with the word "Plaintiff" on Page 11, Line 17 through and including Line 22. By way of further answer to said subparagraph (a), defendant alleges that he has no knowledge about Plaintiff's city's awareness of the provisions of the 8th Amendatory and specifically denies that the process of the application was to defray costs incurred in contract between defendants' agency and developer.

(b) Defendant admits that on November 27, 1974, the 8th Amendatory to the Loan and Grant Contract was executed.

(c) and (d) Defendant admits the allegations of Paragraph X(c) and (d).

(e) Defendant admits that the letter of May 16, 1974 referred to in Paragraph X(e) is a true copy but it denies that he admitted that he was required to prepare an Environmental Impact Statement before making further funds available.

XI

(a) By way of answer to Paragraph XI(a) Defendant alleges that he is presently in the process of preparing an Environmental Impact Statement and that since May 1974 he did cause to have advanced additional funds to defendant agency in the sum in excess [3] of $500,000.00, but said sums were advanced under amendatory land and grant contracts preceding May 1974.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph X(b) and therefore denies same.

(c) Defendant denies the allegations in Paragraph XI(c).

XII

Defendant denies the allegations in Paragraph XII.

AFFIRMATIVE DEFENSES

As Affirmative Defenses to the Complaint, defendant alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

This is in fact a suit against the United States to which it has not consented, and therefore the Court lacks jurisdiction over the United States and its officer sued herein as defendant.

THIRD DEFENSE

Plaintiff does not have standing to bring this action.

FOURTH DEFENSE

Plaintiff is not entitled to maintain this suit by reason of laches.

WHEREFORE, Defendant prays:

1. That the Complaint be dismissed;
2. That Plaintiff take nothing by its complaint herein;
3. That all specific relief against defendant be denied;
4. The Judgment be entered in favor of defendant and against plaintiff; [4]
5. That defendant may have Judgment for costs;
6. For such other and further relief as the Court deems proper.

DATED: January 20, 1975

JAMES L. BROWNING, JR.
United States Attorney

By PAUL E. LOCKE
Paul E. Locke
Assistant United States
Attorney

Attorneys for Defendant
James T. Lynn, Secretary of
the United States Department
of Housing and Urban
Development [5]

Appendix C

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Attorneys for Defendant, Ernest W. Hahn, Inc.

United States District Court
Northern District of California

Civil Action No. C 74 2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
v.
James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF ERNEST W. HAHN, INC. TO COMPLAINT

Defendant, Ernest W. Hahn, Inc., a California corporation, hereinafter sometimes referred to as Developer, by its attorneys, for itself alone, answers the Complaint on file herein by admitting, denying and alleging:

1. Denies each and every allegation contained in paragraph I.

2. In answer to paragraph II, admits that plaintiff City of Rohnert Park, hereinafter sometimes referred to as Plaintiff is, and at the times mentioned in the complaint was, a municipal corporation organized pursuant to the Government Code of the State of California and is situated in the County of Sonoma, State of California. Denies that plaintiff, its [1] inhabitants, taxpayers, or property owners, have been injured in their business or property, or are threatened with injury to their business or property, as a result of any acts or conduct of defendants.

(a) Admits that James T. Lynn was the Secretary of the United States Department of Housing and Urban Development, at the time of the filing of the complaint herein, and that some of the duties of said Secretary are, and were at the times mentioned in the complaint, performed by subordinates based in the San Francisco area office of the Department which is located in the Northern District of California. Admits that among such subordinates of the Secretary based in the San Francisco area of the Department are James H. Price, Area Director; Julian A. Fitzhugh, Program Manager, Area B; and Stephen B. Sachs, Assistant Program Manager, Area B.

(b) Admits that the City of Santa Rosa is, and was at all times mentioned in the complaint, a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions of the Constitution and laws of the State of California, and that the City of Santa Rosa is situated in the County of Sonoma, State of California.

(c) Admits and allege that the Urban Renewal Agency of the City of Santa Rosa, hereafter the Agency, is, and

was at all times mentioned in the complaint, a public body, corporate and politic, organized and existing by virtue of Resolution No. 5552 of the City Council of the City of Santa Rosa, dated March 27, 1958, adopted pursuant to the provisions of Division 24 of the Health and Safety Code of the State of California and the Charter of the City of Santa Rosa and that said Urban Renewal Agency has its office in the City of Santa Rosa.

(d) Admits that Ernest W. Hahn, Inc. is, and was at the times mentioned in the complaint, a California corporation [2] having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California.

Except as expressly admitted, alleged, and denied herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the complaint.

3. In answer to Paragraph IV, admits that the City of Santa Rosa is located approximately seven miles north of the City of Rohnert Park and that United States Highway 101 is a principal means of vehicular travel to the north or south from both cities and in some instances the most convenient means of travel to the north or south from such cities.

(a) Admits that the City of Rohnert Park has purported to adopt a general plan for the City and that such plan allows for the development of land for commercial purposes on both sides of U.S. Highway 101 in the area of the Rohnert Park Expressway, hereafter the Rohnert Park site. Denies that the development of the Rohnert Park site has been, or will be, financed entirely from private capital.

(b) Admits that on or about September 3, 1974, the City Council of the City of Rohnert Park purported to rezone portions of the property within the Rohnert Park site but

denies that said purported rezoning complied with, or was consistent with, the requirements of Section 65860 of the Government Code or other applicable laws of the State of California.

Except as expressly admitted or denied herein alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

4. Denies that the Agency has planned a federally subsidized shopping center and denies that such a shopping center planned by the Agency has inhibited potential developers of the [3] Rohnert Park site from proceeding with such development. Except as expressly denied herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of the complaint.

5. Admits and alleges that the City Council of the City of Santa Rosa, by its Ordinance No. 1036 dated December 5, 1961, adopted a redevelopment plan for the redevelopment project known as Santa Rosa Center Project (Calif. R-45), hereafter the Project; that the area encompassed by the Project, as described in the presently effective amended redevelopment plan, approaches to within approximately one block of U.S. Highway 101; that the redevelopment plan for the Project has been amended from time to time and that amendments to said plan were adopted by the City Council of the City of Santa Rosa on or about March 10, 1970, and October 29, 1974; that the Agency is, and has been at all times mentioned in the complaint, responsible for carrying out the redevelopment plan for the Project on behalf of the City of Santa Rosa; that since 1971 the Agency has been considering proposals for the development of a shopping center within the Project area; that on

or about March 27, 1972, the Agency entered into an agreement with defendant Developer, hereafter the Negotiations Agreement, whereby the Agency agreed to negotiate with no developer except the Developer for a period specified by the Negotiations Agreement, with respect to the development of a shopping center within the Project area; that the Developer has prepared a proposal to develop approximately 30.05 acres, exclusive of streets, within the Project as a shopping center, hereafter the shopping center site; that the Agency has acquired and cleared some of the property within the shopping center site with funds furnished to the Agency by the defendant Secretary; that the amendment of the redevelopment plan for the Project adopted by the City Council of the City of Santa Rosa on October [4] 29, 1974, enlarged the Project area to include a portion of the shopping center site not previously within the Project area; that on October 29, 1974, the Agency approved a land disposition agreement between the Agency and the Developer, hereafter the Land Disposition Agreement; and that present proposals for the implementation of the redevelopment plan for the Project do not contemplate the development of permanent family housing within the Project area. Defendant alleges that the redevelopment plan is not required by law or regulation to make provision for permanent family housing and alleges that no federal funds have been used, or will be used, to acquire or clear property located within the area added to the Project area by the amendment to the redevelopment plan adopted October 29, 1974.

Except as herein expressly admitted or alleged, denies each and every allegation contained in Paragraph VI(a) of the complaint.

(a) In answer to Paragraph VI(b) defendant admits that portion of Paragraph VI(b) commencing with the word

"The" on page 5, line 21, and ending with the words "Home Finance Agency" on page 5, line 29, and admits that portion of Paragraph VI(b) commencing with the word "This" on page 6, line 1, and ending with the figure "$2,625,023." on page 6, line 5. Defendant alleges that said Loan and Grant Contract provided that the United States would defray three-fourths (¾) of the eligible costs of the redevelopment project, such federal share of eligible project costs not to exceed the amounts specified by the Loan and Grant Contract, and allege that, by approval of the original Loan and Grant Contract, the Housing and Home Finance Agency authorized federal loans and grants for redevelopment within the entire Project area, which at the time said contract was approved in March of 1962 encompassed approximately 40 acres.

Except as expressly admitted or alleged herein, [5] defendant denies each and every allegation contained in Paragraph VI(b) of the complaint.

(b) Defendant alleges that the Loan and Grant Contract has been amended nine times and that eight of such amendments increased the amount of the temporary loan and seven of such amendments increased the amount of the Project grant. Defendant admits that the eighth amendment, executed on or about November 27, 1973, increased the temporary loan to a total of $16,557,309 and the Project grant to a total of $12,236,717 and that the sixth amendment to the Loan and Grant Contract, dated September 14, 1970, increased the total Project grant from $3,263,332 to $8,318,497 and increased the temporary loan from $5,908,880 to $13,223,939. Defendant alleges that a portion of the increase in federal funding made by the sixth amendment to the Loan and Grant Contract was intended and used for the purpose of acquiring, clearing, and preparing for development, property with-

in the area of that portion of the Project known as Phase II, which area includes approximately 21.21 acres of the shopping center site. Defendant admits that September 14, 1970 is after the effect of the National Environmental Protection Act (NEPA), Defendant alleges that the Defendant Secretary is presently preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds, but denies that the preparation of an environmental impact statement for the Project is required by the National Environmental Protection Act.

Except as expressly admitted, denied, or alleged herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of the complaint.

6. Defendant alleges that the Land Disposition Agreement provides that the Developer will construct a shopping center containing approximately 713,500 square feet of retail [6] sales space; that the Agency has acquired and cleared some of the property within the shopping center site; that the Agency, to date has expended approximately $4,980,430.00, for acquisition, and $119,919.00 for clearance of such property; that the consideration to be received by the Agency from the Developer for the property of the shopping center site exceeds the fair market value of such property; that as part of the consideration for such property Developer is required by the Land Disposition Agreement to construct public parking facilities having an estimated cost in excess of $5,000,000 to bear the costs of constructing such facilities *in excess of $2,000,000* to reconvey or dedicate to the Agency or the City of Santa Rosa certain parts of such property for public parking purposes, *and to make annual payments of $401,000 to the City of Santa Rosa.* Defendant alleges that the Land Disposition

Agreement has been submitted to Defendant Secretary but has not been approved, or consented to, by Defendant Secretary. [7]

Except as expressly alleged herein, denies each and every allegation contained in Paragraph VII of the complaint.

7. Denies each and every allegation contained in Paragraph VIII.

8. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IX(a), IX(b), IX(c), IX(d), IX(e), IX(f), and IX(g) of the complaint.

(a) Admits that there are now approximately 748,000 square feet of general merchandise space in the City of Santa Rosa and allege that the shopping center proposal of the Developer provides for the construction of approximately 356,500 square feet of general merchandise space. Admits that the shopping center proposal provides for the construction of 347,000 square feet of retail space other than general merchandise space. Except as expressly admitted or alleged herein, denies each and every allegation contained in Paragraph IX(h) of the complaint.

(b) Alleges that the shopping center proposal provides for the construction of 1,256 off-street parking stalls for patrons of the shopping center; that the Land Disposition Agreement provides the Developer will construct a parking structure having estimated cost in excess of $5,000,000.00 and a cost to the Agency not to exceed $2,000,000.00; that the Agency presently intends to defray the local share of total cost for the Project, including costs related to parking facilities, by the issuance of Agency bonds, which may be parking lease revenue bonds, tax allocation bonds, or a combination of both such bonds; that pursuant to Article XIII, Section 19 of the California Constitution, the California

Community Redevelopment Law (Health and Safety Code Section 3600 et seq.) and the redevelopment plan for the Project, the Agency is authorized to issue tax allocation bonds and to have paid into a special fund of the Agency [8] established to pay the principal and interest on loans, monies, advanced to or indebtedness incurred by the Agency to finance or refinance the Project in whole or in part a portion of the property tax revenues collected on property within the Project area; and that the parking structure will be operated and maintained by the City of Santa Rosa consistent with the operation and maintenance of all other off-street parking facilities owned by the City in downtown Santa Rosa. Except as expressly admitted or alleged herein, denies each and every allegation contained in Paragraph IX(i) of the complaint.

(c) Alleges that the Land Disposition Agreement between the Agency and the Developer provides that the Agency will acquire, and sell to the Developer, certain land within the Project area not presently owned by the Agency and that the anticipated cost of acquisition and improvements for such land is $4,959,000 plus $332,100 for site clearance; that part of such property is within the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council of the City of Santa Rosa on October 29, 1974; that the terms of the Land Disposition Agreement provide that the property for the shopping center site within the area added to the Project area by said amendment will be conveyed to the Developer for $1,000,000.00, or equivalent or greater consideration, at the option of the Agency.

Except as admitted or alleged herein, denies each and every allegation contained in Paragraph IX(j) of the complaint.

9. Denies that the implementation or performance of the Land Disposition Agreement will frustrate the planning or

development of a regional retail center at the Rohnert Park site or injure the City of Rohnert Park. Admits that on or about November 27, 1973, the Defendant Secretary approved the Agency's application for an amendment to the Loan and Grant Contract. [9]

Except as admitted herein, alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of the complaint.

10. Defendant alleges that the Defendant Secretary is presently in the process of preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds and that on or about November 1, 1974, the Agency received a capital grant progress payment in the amount of $773,982.00 and a relocation assistance payment in the amount of $335,965.00 such sums being monies allocated to the Agency by amendments to the Loan and Grant Contract previously approved by the Defendant Secretary.

(a) Admits that on or about September 24, 1974, the Agency and the City of Santa Rosa filed an action in the Superior Court of the State of California for the County of Sonoma against the City of Rohnert Park. Denies, on information and belief, that the purpose of said action was to permanently enjoin development at the Rohnert Park site, and that the pleadings on file in said action disclose that the Agency and the City of Santa Rosa claim the sole and exclusive right to develop a regional shopping center in the County of Sonoma or claim the erosion of the said alleged right would result in an irreparable injury to them, and that the action is without merit or was brought to deter the Plaintiff from authorizing and implementing the develop-

ment of the Rohnert Park site in accordance with its general plan.

Alleges, on information and belief, that the purpose of said action by the Agency and the City of Santa Rosa was to determine the adequacy, under California law, of an Environmental Impact Report prepared in connection with a zoning change for property located at the Rohnert Park site, and, if such Environmental Impact Report was determined by the Court to be inadequate, to enjoin a zoning change with respect to certain [10] property located within the Rohnert Park site until an adequate Environmental Impact Report had been prepared; and alleges, on information and belief, that the pleadings and papers on file with the Court in such action disclose that the Association of Area Governments concluded a regional shopping center should not be developed at the Rohnert Park site because of adverse consequences to the environment of the area.

Denies, on information and belief, that the cost of litigating such suit on behalf of the Agency and the City of Santa Rosa is, or was, defrayed with funds obtained by the City of Santa Rosa or the Defendant Secretary.

Except as expressly admitted, denied, and alleged herein, denies each and every allegation contained in Paragraph XI of the complaint.

11. Denies each and every allegation contained in Paragraph XII.

FIRST DEFENSE

The complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

SECOND DEFENSE

The complaint fails to allege a beneficial interest which would entitle plaintiff to bring suit against defendants, or any of them under the Sherman Act, the Clayton Act, the Housing Act of 1949, the Administrative Procedure Act, or any other statute or legal entitlement.

THIRD DEFENSE

Plaintiff's claim is barred by laches.

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of its complaint, for costs of suit incurred herein and for such other and further relief as [11] the Court deems just and proper.

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens

Attorney for Defendant,
Ernest W. Hahn, Inc. [12]

Appendix D

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Attorneys for Defendants City of
Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California

No. C74 2429RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
vs.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants.

ANSWER OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

Defendants, City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa (hereafter collectively referred to as "Defendants") answer the complaint herein as follows:

I

Defendants deny each and every allegation contained in Paragraph I.

II

Defendants admit that plaintiff City of Rohnert Park (hereafter sometimes referred to as "Plaintiff") is, and at the times mentioned in the complaint was, a municipal corporation organized [1] pursuant to the Government Code of the State of California and that Plaintiff is situated in the County of Sonoma, State of California. Defendants deny that Plaintiff, its inhabitants, taxpayers, or property owners, have been injured in their business or property, or are threatened with injury to their business or property, as a result of any acts or conduct of Defendants.

(a) Defendants admit that James T. Lynn was the Secretary of the United States Department of Housing and Urban Development, at the time of the filing of the complaint herein, and that some of the duties of said Secretary are, and were at the times mentioned in the complaint, performed by subordinates based in the San Francisco area office of the Department which is located in the Northern District of California. Defendants admit that among such subordinates of the Secretary based in the San Francisco area of the Department are James H. Price, Area Director;

Julian A. Fitzhugh, Program Manager, Area B; and Stephen B. Sachs, Assistant Program Manager, Area B.

(b) Defendants admit that the City of Santa Rosa is, and was at all times mentioned in the complaint, a municipal corporation organized under a freeholders charter adopted and amended pursuant to the provisions of the Constitution and laws of the State of California and that the City of Santa Rosa is situated in the County of Sonoma, State of California.

(c) Defendants admit and allege that the Urban Renewal Agency of the City of Santa Rosa (hereafter "the Agency") is, and was at all times mentioned in the complaint, a public body, corporate and politic, organized and existing by virtue of Resolution No. 5552 of the City Council of the City of Santa Rosa, dated March 27, 1958, and adopted pursuant to the provisions of Division 24 of the Health and Safety Code of the State of California and the Charter of the City of Santa Rosa and that said Urban Renewal Agency has its office in the City of Santa Rosa. [2]

(d) Defendants admit that Ernest W. Hahn, Inc. (hereafter "the Developer") is, and was at the times mentioned in the complaint, a California corporation, having an office for the transaction of business in the City of Hawthorne, County of Los Angeles, State of California.

Except as expressly admitted, alleged, and denied in Paragraph II of this answer, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the complaint.

III

The complaint contains no Paragraph III.

IV

(a) Defendants admit that the City of Santa Rosa is located approximately seven miles north of the City of Rohnert Park and allege that United States Highway 101 is a principal means of vehicular travel to the north or south from both cities and in some instances the most convenient means of travel to the north or south from such cities.

(b) Defendants admit that the City of Rohnert Park has purported to adopt a general plan for the City and that such plan allows for the development of land for commercial purposes on both sides of U.S. Highway 101 in the area of the Rohnert Park Expressway (hereafter "the Rohnert Park site"). Defendants deny that the development of the Rohnert Park site has been, or will be, financed entirely from private capital.

(c) Defendants admit that on or about September 3, 1974, the City Council of the City of Rohnert Park purported to rezone portions of the property within the Rohnert Park site but deny that said purported rezoning complied with, or was consistent with, the requirements of Section 65860 of the Government Code or other applicable laws of the State of California.

Except as expressly admitted or denied in Paragraph IV of this [3] answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

V

Defendants deny that the Agency has planned a federally subsidized shopping center and deny that such a shopping center planned by the Agency has inhibited potential developers of the Rohnert Park site from proceeding with such

development. Except as expressly denied in Paragraph V of this answer Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of the complaint.

VI

(a) Defendants admit and allege that the City Council of the City of Santa Rosa, by its Ordinance No. 1036 dated December 5, 1961, adopted a redevelopment plan for the redevelopment project known as Santa Rosa Center Project (Calif. R-45) (hereafter "the Project"); that the area encompassed by the Project, as described in the presently effective amended redevelopment plan, approaches to within approximately one block of U.S. Highway 101; that the redevelopment plan for the Project has been amended from time to time and that amendments to said plan were adopted by the City Council of the City of Santa Rosa on or about March 10, 1970, and October 29, 1974; that the Agency is, and has been at all times mentioned in the complaint, responsible for carrying out the redevelopment plan for the Project on behalf of the City of Santa Rosa; that since 1971 the Agency has been considering proposals for the development of a shopping center within the Project area; that on or about March 27, 1972, the Agency entered into an agreement with the Developer (hereafter "the Negotiations Agreement") whereby the Agency agreed to negotiate with no developer except the Developer, for a period specified by the Negotiations [4] Agreement, with respect to the development of a shopping center within the Project area; that the Developer has prepared a proposal to develop approximately 30.05 acres, exclusive of streets, within the Project as a shopping center (hereafter "the shopping center site"); that the Agency has acquired and

cleared some of the property within the shopping center site with funds furnished to the Agency by the defendant Secretary; that the amendment of the redevelopment plan for the Project adopted by the City Council of the City of Santa Rosa on October 29, 1974, enlarged the Project area to include a portion of the shopping center site not previously within the Project area; that on October 29, 1974, the Agency approved a land disposition agreement between the Agency and the Developer (hereafter "the Land Disposition Agreement"); and that present proposals for the implementation of the redevelopment plan for the Project do not contemplate the development of permanent family housing within the Project area. Defendants allege that the redevelopment plan is not required by law or regulation to make provision for permanent family housing and allege that no federal funds have been used, or will be used, to acquire or clear property located within the area added to the Project area by the amendment to the redevelopment plan adopted October 29, 1974.

Except as expressly admitted or alleged in Paragraph VI(a), Defendants deny each and every allegation contained in Paragraph VI(a) of the complaint.

(b) Defendants admit that portion of Paragraph VI(b) commencing with the word "The" on page 5, line 21, and ending with the words "Home Finance Agency" on page 5, line 29, and admit that portion of Paragraph VI(b) commencing with the word "This" on page 6, line 1, and ending with the figure "$2,625,023." on page 6, line 5. Defendants allege that said Loan and Grant contract provided that the United States would defray three-fourths [5] (¾) of the eligible costs of the redevelopment project, such federal share of eligible project costs not to exceed the amounts specified by the Loan and Grant Contract, and allege that,

by approval of the original Loan and Grant Contract, the Housing and Home Finance Agency authorized federal loans and grants for redevelopment within the entire Project area, which at the time said contract was approved in March of 1962 encompassed approximately 40 acres.

Except as expressly admitted or alleged in Paragraph VI(b) of this answer, Defendants deny each and every allegation contained in Paragraph VI(b) of the complaint.

(c) Defendants allege that the Loan and Grant Contract has been amended nine times and that eight of such amendments increased the amount of the temporary loan and seven of such amendments increased the amount of the Project grant. Defendants admit that the eighth amendment, executed on or about November 27, 1973, increased the temporary loan to a total of $16,557,309 and the Project grant to a total of $12,236,717 and that the sixth amendment to the Loan and Grant Contract, dated Sepember 14, 1970, increased the total Project grant from $3,263,332 to $8,318,497 and increased the temporary loan from $5,908,880 to $13,223,939. Defendants allege that a portion of the increase in federal funding made by the sixth amendment to the Loan and Grant Contract was intended and used for the purpose of acquiring, clearing, and preparing for development, property within the area of that portion of the Project known as Phase II, which area includes approximately 21.21 acres of the shopping center site. Defendants admit that September 14, 1970 is after the effect of the National Environmental Protection Act (NEPA). Defendants allege that the Defendant Secretary is presently preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds, but deny that the preparation of an environmental [6] impact statement for the Project is required by the National Environmental Protection Act.

Except as expressly admitted, denied, or alleged in Paragraph VI of this answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VI of the complaint.

VII

Defendants allege that the Land Disposition Agreement provides that the Developer will construct a shopping center containing approximately 713,500 square feet of retail sales space; that the Agency has acquired and cleared some of the property within the shopping center site; that the Agency, to date, has expended approximately $4,980,430.00, for acquisition, and $119,919.00 for clearance, of such property; that the consideration to be received by the Agency from the Developer for the property of the shopping center site exceeds the fair market value of such property; that as part of the consideration for such property Developer is required by the Land Disposition Agreement to construct public parking facilities having an estimated cost in excess of $5,000,000, to bear the cost of constructing such facilities in excess of $2,000,000.00, to reconvey or dedicate to the Agency or the City of Santa Rosa certain parts of such property for public parking purposes, and to make annual payments of $401,000 to the City of Santa Rosa. Defendants allege that the Land Disposition Agreement has been submitted to Defendant Secretary but has not been approved, or consented to, by Defendant Secretary.

Except as expressly alleged in Paragraph VII of this answer, Defendants deny each and every allegation contained in Paragraph VII of the complaint.

VIII

Defendants deny each and every allegation contained in Paragraph VIII. [7]

IX

(a) Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IX(a), IX(b), IX(c), IX(d), IX(e), IX(f), and IX(g) of the complaint.

(b) Defendants admit that there are now approximately 748,000 square feet of general merchandise space in the City of Santa Rosa and allege that the shopping center proposal of the Developer provides for the construction of approximately 356,000 square feet of general merchandise space. Defendants admit that the shopping center proposal provides for the construction of 347,000 square feet of retail space other than general merchandise space. Except as expressly admitted or alleged in Paragraph IX(b) of this answer, Defendants deny each and every allegation contained in Paragraph IX(h) of the complaint.

(c) Defendants allege that the shopping center proposal provides for the construction of 1,256 off-street parking stalls for public parking; that the Land Disposition Agreement provides the Developer will construct a parking structure having estimated cost in excess of $5,000,000.00 and a cost to the Agency not to exceed $2,000,000.00; that the Agency presently intends to defray the local share of total cost for the Project, including costs related to parking facilities, by the issuance of Agency bonds, which may be parking lease revenue bonds, tax allocation bonds, or a combination of both such bonds; that pursuant to Article XIII, Section 19 of the California Constitution, the California Community Redevelopment Law (Health and Safety Code Sections 36000 et seq.), and the redevelopment plan for the Project, the Agency is authorized to incur indebtedness and to have paid into a special fund of the Agency—established

to pay the principal and interest on loans, monies, advanced to, or indebtedness incurred by the Agency to finance or refinance the Project in whole or in [8] part—a portion of the property tax revenues collected on property within the Project area; and that the parking structure will be operated and maintained by the City of Santa Rosa consistent with the operation and maintenance of all other off-street parking facilities owned by the City in downtown Santa Rosa.

Except as expressly admitted or alleged in Paragraph IX(c) of this answer, Defendants deny each and every allegation contained in Paragraph IX(i) of the complaint.

(d) Defendants allege that the Land Disposition Agreement between the Agency and the Developer provides that the Agency will acquire, and sell to the Developer, certain property within the Project area not presently owned by the Agency and that the anticipated cost to the Agency of acquisition of land and improvements is $4,959,000, plus $332,100 for site clearance; that part of such property is within the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council of the City of Santa Rosa on October 29, 1974; that the terms of the Land Disposition Agreement provide that the property for the shopping center site within the area added to the Project area by said amendment will be conveyed to the Developer for $1,000,000.00, or equivalent or greater consideration, at the option of the Agency.

Except as admitted or alleged in Paragraph IX(d) of this answer, Defendants deny each and every allegation contained in Paragraph IX(j) of the complaint.

X

Defendants deny that the implementation or performance of the Land Disposition Agreement will frustrate the plan-

ning or development of a regional retail center at the Rohnert Park site or injure the City of Rohnert Park. Defendants admit that on or about November 27, 1973, the Defendant Secretary approved the Agency's application for an amendment to the Loan and Grant [9] Contract. Except as admitted in Paragraph X of this answer, Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of the complaint.

XI

(a) Defendants allege that the Defendant Secretary is presently in the process of preparing an environmental impact statement for a portion of the Project financed, in part, by federal funds and that or or about November 1, 1974 the Agency received a capital grant progress payment in the amount of $773,982.00 and a relocation assistance payment in the amount of $335,965.00, such sums being monies allocated to the Agency by amendments to the Loan and Grant Contract previously approved by the Defendant Secretary.

(b) Defendants admit that on or about September 24, 1974, the Agency and the City of Santa Rosa filed an action in the Superior Court of the State of California for the County of Sonoma against the City of Rohnert Park. Defendants deny that the purpose of said action was to permanently enjoin development at the Rohnert Park site, deny that the pleadings on file in said action disclose that the Agency and the City of Santa Rosa claim the sole and exclusive right to develop a regional shopping center in the County of Sonoma or claim that the errosion of the said alleged right would result in an irreparable injury to them; deny that the action is without merit or was brought to

deter the Plaintiff from authorizing and implementing the development of the Rohnert Park site in accordance with its general plan.

Defendants allege that the purpose of said action by the Agency and the City of Santa Rosa was to determine the adequacy, under California law, of an Environmental Impact Report prepared in connection with a zoning change for property located at [10] the Rohnert Park site, and, if such Environmental Impact Report was determined by the Court to be inadequate, to enjoin a zoning change with respect to said property until an adequate Environmental Impact Report had been prepared. Defendants allege that the pleadings and papers on file with the Court in such action disclose that the Association of Bay Area Governments concluded a regional shopping center should not be developed at the Rohnert Park site because of adverse consequences to the environment of the area.

(c) Defendants deny that the cost of litigating such suit on behalf of the Agency and the City of Santa Rosa is, or was, defrayed with funds obtained by the City of Santa Rosa or the Agency from the Defendant Secretary.

Except as expressly admitted, denied, and alleged in Paragraph XI of this answer, Defendants deny each and every allegation contained in Paragraph XI of the complaint.

XII

Defendants deny each and every allegation contained in Paragraph XII.

FIRST DEFENSE

The complaint fails to state a claim against Defendants, or any of them, upon which relief can be granted.

SECOND DEFENSE

The complaint fails to allege a beneficial or legal interest which would give Plaintiff standing to sue, or entitle Plaintiff to bring suit against Defendants, or any of them, under the Sherman Act, the Clayton Act, the Housing Act of 1949, the Administrative Procedure Act, or any other statute, with respect to the conduct and activities referred to in the complaint.

THIRD DEFENSE

Plaintiff has known since at least as early as September, 1970, the Defendant Agency would receive federal funds to defray [11] the costs of redevelopment with the area added to the Project area by the amendment to the redevelopment plan adopted by the City Council on March 10, 1970, and since at least as early as August, 1973, that the Agency and the Developer intended to enter into the Land Disposition Agreement and of the terms and provisions of such agreement. Plaintiff failed during the periods of time from the dates mentioned to the time of filing of this suit to seek a judicial determination of the validity of Defendants' acts and of plaintiff's legal rights. During such periods Defendants, with the knowledge of plaintiff and with the belief in good faith of the propriety of their actions, spent substantial funds to accomplish the redevelopment of the Project area and those acts necessary to allow performance of the Land Disposition Agreement. Therefore, plaintiff is barred by laches from claiming that the acts of Defendants, or any of them, under the circumstances are wrongful or in violation of any of the laws referred to in the complaint.

FOURTH DEFENSE

The alleged controversies referred to in the complaint are hypothetical, moot, or political and are not justiciable controversies under 28 U.S.C. 2201.

FIFTH DEFENSE

Plaintiff should be denied the injunctive relief prayed for because such injunctive relief will cause irreparable harm to Defendants.

SIXTH DEFENSE

On or about September 3, 1974, Plaintiff purported to make a zoning change, initiated upon the application of Codding Enterprises and Hugh Codding, of a portion of the property located at the Rohnert Park site. By such zoning change Codding Enterprises and Hugh Codding sought to carry out plans to develop land owned by Codding Enterprises as a regional shopping center to be owned [12] and operated by Codding Enterprises. Codding Enterprises and Hugh Codding are the developers and owners or part owners of all regional shopping center facilities in the County of Sonoma and such interests constitute a monopoly of regional shopping center facilities in the said county. The development of the Rohnert Park site as a regional shopping center would meet, and fill, the demand for such facilities in Sonoma County for the next twenty years and would inhibit and discourage potential developers of regional shopping center facilities, which would compete with the regional shopping center facilities developed and owned by Codding Enterprises and Hugh Codding, from developing such facilities at the shopping center site located within the Project area or at any other location within

Sonoma County. Under the circumstances, the shopping center proposal of Defendant Developer, the Land Disposition Agreement, and the actions and conduct of the Defendants referred to in the complaint will promote, and not restrain, competition in trade and commerce.

WHEREFORE, Defendants pray;

1. (a) That Plaintiff take nothing by its complaint herein, that Plaintiff be denied the relief prayed for in the complaint, or any other relief, and that this action be dismissed or in the alternative, if the Court determines that an adjudication of rights and obligations herein is proper;

   (b) That the Court enter judgment:

   (1) Declaring that the sale of land to Defendant Developer by Defendant Agency is not a conveyance for less than fair market value of the land for its highest and best uses permitted under the redevelopment plan and is not illegal or in violation of 42 U.S.C. 1460(c)(4) or Section 33433, Health and [13] Safety Code;

   (2) Declaring that Defendant Secretary will not be acting illegally or in excess of his authority if he approves the agreement between Defendant Agency and Defendant Developer for disposition of said land to the latter;

   (3) Declaring that the issuance by Defendant Agency of tax allocation bonds to finance redevelopment costs and indebtedness incurred by the Defendant Agency in connection with the Project will not cause damage

or harm to the various taxing agencies of the County of Sonoma or to Plaintiff City;

(4) Declaring that Defendant Secretary has acted legally and within his authority in approving payments of public funds to Defendant Agency without completing an environmental impact statement pursuant to the provisions of the National Environmental Policy Act and that Defendant Secretary may continue to approve such payments of public funds to the Defendant Agency without preparing such environmental impact statement;

(5) Declaring that Defendant Secretary has acted legally and within his authority in approving payments of public funds to the Defendant Agency without ascertaining that action and conduct of Defendant Agency and Defendant City complies with the laws of the State of California and that Defendant Secretary may continue to approve such payments of public funds to the Defendant Agency without ascer- [14] taining that actions and conduct of the Defendant Agency and Defendant City comply with the laws of the State of California;

(6) Declaring that the agreement between Defendant Agency and Defendant Developer, if carried out, will not be, or represent, a conspiracy or combination of interstate commerce or commerce in Sonoma County;

(7) Declaring that the Agreement between Defendant Agency and Defendant Developer, if carried out, will not be, or represent, an attempt to monopolize, or a combination or conspiracy to monopolize, interstate trade or commerce in Sonoma County, or any part thereof.

(8) Declaring that neither Plaintiff City, nor its inhabitants, merchants, property owners, or taxpayers, has suffered loss or damage or is threatened with loss or damage, in any sum or amount, by reason of any acts or conduct of the Defendants referred to in the complaint;

(9) Declaring that Plaintiff City is not entitled to sue for, or have, injunctive or any other form of relief by reason of any acts or conduct of Defendants referred to in the complaint; and

(10) Declaring that Defendants have not violated, and are not threatening to violate, the antitrust laws, the Housing Act of 1949, the California Community Redevelopment Law, the National Environmental Protection Act, or the Administrative Procedure Act;

2. That Defendants be awarded all costs sustained by them [15] in defending this action, including without limitation, reasonable attorneys' fees;

3. That Defendants be granted such other relief as the Court deems proper.

Dated: January 20, 1975.

JOSEPH E. COOMES, JR.
RICHARD E. BRANDT

By JOSEPH E. COOMES, JR.
Attorneys for Defendants City of Santa Rosa and Urban Renewal Agency of the City of Santa Rosa

Appendix E(1)

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Attorneys for Defendant, Ernest W. Hahn, Inc.

United States District Court
Northern District of California

CIVIL ACTION NO.
C 74-2429 RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,
v.
James T. Lynn, etc., et al.,
Defendants.

MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT, AFFIDAVIT OF JOHN M. GILCHRIST, JR. AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant ERNEST W. HAHN, INC., hereby moves the Court that it enter, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, a summary judgment in favor of said Defendant, on the ground that there is no genuine issue of material fact, and that Defendant ERNEST W. HAHN, INC. is entitled to judgment as a matter of law.

This motion is based on the affidavit of JOHN M. GILCHRIST, JR., and the Memorandum of Points and Authorities, both of which are attached hereto, and on the files and records of this proceeding.

Dated: August 11, 1976.

BARRET, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens [1]

NOTICE OF MOTION

TO PLAINTIFF, CITY OF ROHNERT PARK, AND TO COTTON, SELIGMAN & RAY, ITS ATTORNEYS:

PLEASE TAKE NOTICE, that on September 10, 1976, at 9:30 o'clock AM, or as soon thereafter as counsel can be heard, in Court Room No. 5, United States Courthouse, Federal Building, 450 Golden Gate Avenue, San Francisco, California, the undersigned will bring the above Motion on for hearing.

Dated: August 11, 1976.

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens [2]

Appendix E(2)

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Attorneys for Defendant, Ernest W. Hahn, Inc.

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Defendants.

AFFIDAVIT OF JOHN M. GILCHRIST, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
County of Los Angeles—ss.

JOHN M. GILCHRIST, JR. being first duly sworn, deposes and says:

1. Affiant is vice president in charge of development pre-planning of Defendant ERNEST W. HAHN, INC., a

California corporation ("HAHN"). Affiant is familiar with the operations of HAHN pertaining to the acquisition, development, construction, operation, and management of regional and other shopping centers, including those centers presently in operation, those centers in the process of development or construction, and those centers which are only in the planning stage.

2. HAHN is in the process of developing a downtown commercial shopping center as an integral part of a federally [1] sponsored urban renewal project in Santa Rosa, California, to be known as "Santa Rosa Plaza" ("PROJECT").

3. At the present time, HAHN does not have an interest, as developer, owner, manager, or otherwise, in any regional or other type of shopping center or in any retail outlet in the County of Sonoma, other than the PROJECT. Nor does HAHN have any plans for the acquisition, development, construction, operation, or management of any shopping center or retail oulet in Sonoma County, other than the PROJECT.

4. The closest shopping center owned, operated, or managed by HAHN to the City of Rohnert Park is a regional shopping center in San Jose, California, known as Oakridge Mall. The next closest shopping center owned, operated, or managed by HAHN is a regional center in Redding, California, known as Mt. Shasta Mall. The closest shopping center in the planning stage to Rohnert Park is located in Corte Madera, California, approximately 40 miles from Rohnert Park.

5. By Ordinance No. 1036, dated December 5, 1961, Defendant City of Santa Rosa ("CITY") adopted a redevelopment plan for the PROJECT to be implemented by Defendant Urban Renewal Agency of the City of Santa

Rosa ("AGENCY"), a public body corporate and politic, organized and existing by virtue of Resolution No. 552 of the City Council of Defendant CITY dated March 27, 1958. (Since 1971, the AGENCY has considered the development of a downtown shopping center as an integral part of the project, and on or about March 27, 1972, entered into an agreement with Defendant HAHN whereby the AGENCY agreed to negotiate with no other developer for a period specified in the agreement, and thereafter extended from time to time, with respect to the development of such a shopping center.

6. Following extensive planning, design, and economic analysis, discussion and negotiations, HAHN submitted a proposal for the development of approximately 30 acres within the project as a [2] commercial shopping center. (On or about October 29, 1974, the CITY duly adopted and approved an amendment to the redevelopment plan which enlarged the project area to include a portion of the shopping center site not previously within the project area. On that date the AGENCY approved a land Disposition and Development Agreement ("AGREEMENT") between the AGENCY and HAHN.

7. That HAHN is presently engaged in the construction of downtown shopping centers in Redevelopment projects in Santa Maria, California, and Hawthorne, California. That in addition to the PROJECT, HAHN has plans for downtown shopping centers in Redevelopment projects located in Santa Monica, California, Pasadena, California, Sunnyvale, California, Long Beach, California, San Diego, California, Sommerville, New Jersey, and Ogden, Utah.

8. That the agreement between HAHN and the AGENCY pertaining to the PROJECT provides for no greater benefits to HAHN than those which HAHN has received

or contemplates receiving pursuant to similar Disposition and Development Agreements with the Urban Renewal Agencies in all of the other Redevelopment projects referred to in Paragraph 7 hereof.

9. HAHN entered into the Agreement with the AGENCY and, thereafter, attempted to develop the project pursuant to such agreement without any intent to set prices or exclude competition in the shopping center business in Sonoma County, California, or elsewhere.

10. The statements made herein are true of my own personal knowledge and if called as a witness I can competently testify thereto.

JOHN M. GILCHRIST, JR.
John M. Gilchrist, Jr.

Subscribed and sworn to before me
this 10th day of August 1976.

BARBARA L. EVANS
Notary Public

Official Seal
BARBARA L. EVANS
Notary Public California
Principal Office in
Los Angeles County
My Commission Expires Jan. 13, 1978 [3]

Appendix E(3)

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNEST W. HAHN, INC's MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNEST W. HAHN, INC's MOTION FOR SUMMARY JUDGMENT

I

PRELIMINARY STATEMENT

Defendant ERNEST W. HAHN, INC'S ("HAHN") Motion for Summary Judgment is being filed and set for

hearing concurrently with Motions for Summary Judgment by all other defendants in this action. Defendant HAHN hereby refers to all other defendants' Motions for Summary Judgment, and the supporting Affidavits and Memoranda of Points and Authorities, and by reference makes the same a part hereof.

Examination of the vague and unspecific contents of the Complaint reveals that the only charging allegations concerning Defendant HAHN consists of allegations of an agreement between [1] HAHN and Defendant Urban Renewal Agency of the City of Santa Rosa ("AGENCY") for the development and construction by HAHN of a downtown commercial shopping center as an integral part of a federally sponsored urban renewal project in Santa Rosa, California, to be known as "Santa Rosa Plaza ("PROJECT"). This agreement is not specifically described but apparently is the Disposition and Development Agreement which is the basic agreement in urban renewal projects between the agency and the developer. This agreement, it is alleged, unduly restrains trade and commerce in violation of the Sherman Act (15 U.S.C. 1 and 2). It would appear that no other violation of law, or other actionable conduct, is alleged to have been committed by HAHN.

What standing Plaintiff, City of Rohnert Park, a municipal corporation, has to maintain this action against HAHN is not set forth with any degree of specificity. There is a general allegation that "Plaintiff CITY, its inhabitants, taxpayers, and property owners have been injured in their business and property, ..." (Page 2, line 10 et seq of the Complaint) and an equally general and vague allegation that certain real property in the City of Rohnert Park was designated in the Master Plan as a site for the development of a regional shopping center, and that "some of the

real property so designated is and was at all times herein material owned by Plaintiff CITY." (Page 3, line 27 et seq) However, there is no allegation of what "business and property" of Plaintiff CITY has been injured or of what real property was owned by Plaintiff CITY or its nature and/or use.

This Memorandum will attempt to show that Defendant HAHN has not committed any violation of the Sherman Act and that, assuming *arguendo,* it had, Plaintiff CITY has no standing to maintain an action based thereon. [2]

II

SINCE ECONOMIC CONSEQUENCES BROUGHT ABOUT BY GOVERNMENTAL ACTION CANNOT GIVE RISE TO LIABILITY UNDER THE SHERMAN ACT, THE AGREEMENT BETWEEN HAHN AND THE AGENCY DOES NOT VIOLATE THE SHERMAN ACT

A principle established by numerous judicial decisions is that the functions performed by a governmental agency, and functions performed by private parties under the direction of a governmental agency which the governmental agency could have performed itself as a public function, are exempt from application of the anti-trust laws. *Parker vs. Brown* (1904), 195 U.S. 332, 49 L.Ed. 224; *E. W. Wiggins Airway, Inc. vs. Mass. Port Authority* (1970) 362 Fed. 2nd 52; *Hecht vs. Pro Football, Inc.* (1971) 444, Fed. 2nd 931, 939.

The case of *Gibson & Perin Co. vs. Cincinnati* (1973) 480 Fed. 2nd 936 is strikingly similar to the instant case. There, plaintiffs alleged that they were the victims of discrimination in the form of a competitive advantage to private parties resulting from the Redevelopment program in Cin-

cinnati. They objected that the design and construction of a Redevelopment parking facility made that facility particularly beneficial to a merchant within the Redevelopment project and placed plaintiffs, who were located outside the project, at a competitive disadvantage. The Complaint alleged, *inter alia,* violation of federal and state anti-trust laws.

The trial court ruled partially in favor of plaintiffs. The United States Court of Appeal, Sixth Circuit, reversed that judgment and remanded the case to the trial court with instructions to dismiss the complaint. The Court of Appeal rejected the plaintiffs' claims under the Sherman Act with the concise and unambiguous comment: "Participation in an Urban Redevelopment Project does not violate the anti-trust laws." *Gibson & Perin Co.,* [3] *supra,* at p. 946.

III

PLAINTIFF LACKS STANDING TO ASSERT ANTI-TRUST CLAIMS AGAINST DEFENDANT HAHN

A. *Plaintiff cannot show an injury to "business or property."* The words "business or property," as used in Section 4 of the Clayton Act (15 U.S.C. § 15), which authorizes the recovery of treble damages for injury to a "person's business or property" by reason of violations of the federal anti-trust laws, refer to commercial interests or enterprises. *Hawaii vs. Standard Oil Co.* (1972) 405 U.S. 251, 31 L.Ed. 2nd 184.

In Hawaii vs. Standard Oil Co., *supra,* the State of Hawaii asserted various anti-trust claims against the defendants in connection with the defendants' sale, marketing, and distribution of refined petroleum products. One of the counts of the Complaint alleged that the State brought

the action as *parens patriae* and was entitled to recover treble damages for injury to the State's economy and prosperity. Such injury allegedly included the wrongful extraction from the State of its citizens' revenues; increased taxes to offset such losses of such revenues; curtailment of manufacturing, shipping, and commerce; and competitive disadvantages to Hawaiian goods in the national market. The District Court denied the defendants' Motion to Dismiss, but the Court of Appeals for the Ninth Circuit reversed and directed the count to be dismissed on the ground that injury to the State's general economy was not an injury to "business or property."

In the instant case, Plaintiff CITY has not alleged and cannot prove any injury to "business or property" since it neither alleges nor has the proprietary commercial interest which can be adversely affected by the purported violations of Defendants. The conclusory allegation that "Plaintiff CITY, its inhabitants, taxpayers, and property owners have been injured in their business [4] and property . . ." is insufficient to establish either "injury" or the existence of "business or property" capable of being injured.

Similarly, the allegation that some of the real property designated as a site for the development of commercial facilities including a regional shopping center was owned by Plaintiff CITY, is insufficient to constitute "business or property." In *Martin vs. Phillips Petroleum Company* (1966) 365 F.2nd 629 a summary judgment for defendants was affirmed on appeal. The Court of Appeals held that where Plaintiff sought treble damages on the basis of asserted combination of defendants to restrain or monopolize interstate commerce by taking over and replacing Plaintiff in the acquisition of a gas plant, but plaintiff had had no experience in the operation of a gas plant, did

not have ability to finance business and made no investment in facilities or equipment, plaintiff was not injured in his business. The Court stated that while one need not have an actual going business to obtain standing ". . . there must be the intention to enter the business; . . . there must be a showing of preparedness to enter the business . . . ." 365 F.2nd 633.

B. *Even if Plaintiff suffered injury to "business or property" it lacks standing because any injury would not be within the "target area."*

In *In Re Multi-District Vehicle Air Pollution M.D.L. No. 31 et al vs. Automobile Manufacturers Association, Inc. et al* (1973) 481 F.2nd 122, an appeal was taken from denial, by the District Court, of Motions to Dismiss actions under the Clayton Act where it was alleged that Automobile Manufacturers conspired to eliminate all competition in research and development of motor vehicle air pollution equipment and in the purchase of patents and patent rights covering such equipment. The Ninth Circuit Court of Appeals held that where neither the Government's individual claims or its class claims nor its *parens patriae* claims alleged any [5] injury to commercial ventures or enterprises, the governmental entities had no standing to seek recovery under the treble damages section of the Clayton Act, and although farmers who alleged diminished crop yield by reason of the anti-trust violation satisfied the requirement of injury to "business or property," they likewise had no standing to seek treble damages because the injuries complained of were not within the "target area."

In *In Re Multi-District, supra,* the Court quotes from another Ninth Circuit case, *Conference of Studio Unions vs. Lowe's, Inc.* (1951) 193 F.2nd 51, 54-55; cert. denied 342 U.S. 919, 96 L.Ed. 687 as follows:

> "[T]o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws."

In the instant case, even if Plaintiff CITY had injury to "business or property" such injury would be indirect and collateral and would not be to a commercial enterprise of plaintiff in the area of the economy in which the elimination of competition occurred. The target area for any violation by HAHN of the anti-trust laws would be the shopping center business, a business in which Plaintiff has never been an active participant. "Standing is denied . . . if the claimant's commercial activity occurred outside that area of the economy." *In Re Multi-District, supra,* page 126.

C. *Plaintiff cannot maintain an action as parens patriae.*

Any attempt by Plaintiff CITY to represent "its inhabitants, taxpayers, and property owners" must fail since a city cannot sue as *parens patriae,* even for injunctive relief based on Section 16 of the Clayton Act (15 U.S.C. Section 26). [6] As stated in *In Re Multi-District, supra,* at page 131:

> "... the Federal Government and the States, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances, sue as *parens patriae* to vindicate interests of their citizens ... (Citations omitted). On the other hand, political subdivisions such as cities and counties, whose power is derivitive and not sovereign, cannot sue as *parens patriae,* ..."

IV

CONCLUSION

For the foregoing reasons, Defendant ERNEST W. HAHN, INC. is entitled to summary judgment in its favor.

Dated August 11, 1976.

Respectfully submitted,

BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY

By WILLIAM N. WILLENS
William N. Willens [7]

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ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant ERNEST W. HAHN, INC's Motion for Summary Judgment having come on regularly to be heard this day, and it appearing that Notice of Motion was given to Plaintiff pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, and it appearing that there is no genuine issue as to material fact, and that Defendant ERNEST W. HAHN, INC. is entitled to judgment as a matter of law; therefore,

IT IS ORDERED that Defendant ERNEST W. HAHN, INC's Motion for Summary Judgment be, and the same is, hereby granted.

Dated ....., 1976.

.....

Judge, U.S. District Court [1]

Appendix F(1)

Original Filed
Aug 20 1976

Clerk, U.S. Dist. Court
San Francisco

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In the United States District Court
for the Northern District of California

CIVIL NO. C-74-2429-RHS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANT SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

TO PLAINTIFF and to WILLIAM M. BRINTON AND RICARDO J. HECHT, its attorneys:

PLEASE TAKE NOTICE that on September 24, 1976, at 9:30 a.m., or as soon thereafter as counsel may be heard,

in Courtroom No. 5, of the above entitled court located at 450 Golden Gate Avenue, San Francisco, California, defendant, Secretary of the United States Department of Housing and Urban Development, will move the Court for an order dismissing the complaint and entering summary judgment in favor of defendant and against plaintiff.

This motion is made under Federal Rule of Civil Procedure 56(b) on the ground that the action raises no genuine issue as to any material fact and the defendant Secretary is entitled to judgment [1] as a matter of law and the ground that the Court lacks subject matter jurisdiction.

This motion is based on this notice, the pleadings, records, and files herein, on the affidavits of Julian A. Fitzhugh and Leevérn Johnson and the memorandum of points and authorities filed in support of this motion, and on the proposed summary judgment filed herewith.

Dated: August 20, 1976

JAMES L. BROWNING, JR.
United States Attorney

By: PAUL E. LOCKE
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Appendix F(2)

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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#1719

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I INTRODUCTION

This is an action instituted by the City of Rohnert Park against the Secretary of the United States Department of Housing and Urban Development, the City of Santa Rosa, its Urban Renewal Agency and Ernest W. Hahn, Inc. The suit seeks injunctive and declaratory relief in connection with the Santa Rosa Center project, a federally assisted

Urban Renewal Project in the City of Santa Rosa, California. Specifically, plaintiff demands to enjoin the Secretary of HUD from approving a certain land disposition agreement which has been entered into between defendants Santa Rosa's Urban Renewal Agency and Ernest W. Hahn, Inc., which agreement contemplates the construction and development of a regional shopping center in the City of Santa Rosa. Federal funds, by way of loan and grant [1] contract, will be involved for part of the proposed regional shopping center. Plaintiff bases its prayer for injunctive relief on the following grounds:

1. The Secretary has not prepared an Environmental Impact Statement (EIS) for the regional shopping center pursuant to NEPA 42 U.S.C. § 4321 *et seq.*

2. The Secretary is acting in violation of the antitrust laws of the United States. 15 U.S.C. § 1, 2.

3. The Secretary is acting in violation of the Housing Act of 1949 as amended, particularly 42 U.S.C. 1460(c)(4) and HUD's Urban Renewal Handbook 7214.1 Rev. Ch. 1. p. 1., Ch. 3, p. 9, as well as in violation of the California Health and Safety Code § 33433.

II STATEMENT OF FACTS NOT IN DISPUTE

The Federal defendant submits the following facts are not in dispute:

A. Plaintiff in municipal corporation existing under the laws of the State of California located approximately seven (7) miles south of the City of Santa Rosa (see Complaint, paragraph IV(a).)

B. The Santa Rosa Center Project is a federally-assisted Urban Renewal project in the City of Santa Rosa. The Santa Rosa Urban Renewal Plan was adopted by the City Council of Santa Rosa on December 5, 1961, and approved

by the Housing and Home Finance Agency (HHFA), predecessor of HUD on January 15, 1962. HHFA approved the first amendment to the Plan on January 14, 1964. HUD approved the third amendment to the Plan on May 25, 1970. This amendment was adopted by the Santa Rosa Redevelopment Agency on March 3, 1970 and adopted by the City Council of Santa Rosa on March 10, 1970.

The purpose of the third amendment to the Urban Renewal Plan was to increase the project area by 31.2 acres. This activity was [2] commenced as a result of damage caused by an earthquake which occurred in October 1969. Renewal treatment of the added area was undertaken to protect the adjacent area which had already been renewed from the spread of blight as a result of damage and deterioration caused by the earthquake.

HHFA had allocated $171,049.00 to the Santa Rosa Redevelopment Agency to undertake planning activities in the downtown area of Santa Rosa. This allocation order was amended March 6, 1962 to increase the amount to $190,898.00 for the purpose of completing the redevelopment plan and a loan and grant application. On March 9, 1962, HHFA received Part I of the Loan and Grant application from the Santa Rosa Redevelopment Agency the purpose of which was to carry out urban renewal activities in the Santa Rosa Center Project Area under Title I of the Housing Act of 1949. On June 6, 1962 the Loan and Grant Contract was executed which authorized the commencement of project activities in the 39.9 acres of downtown Santa Rosa. The contract provided for a Federal loan in the amount of $4,922,616.00 and a Federal Project Grant of $2,625,023.00.

This contract has been amended nine times on the following dates for the following reasons:

1st Amendatory to the Loan and Grant Contract executed June 18, 1963 increased the total grant to $2,694,263.00 and the total loan to $4,957,945.00.

2nd Amendatory to the Loan and Grant Contract executed February 7, 1964 increased the total grant to $3,184,594.00 and the total loan to $5,450,497.00.

3rd Amendatory to the Loan and Grant Contract executed October 18, 1963 decreased the total grant to $3,161,108.00 and increased the total loan amount to $5,778,721.00.

4th Amendatory to the Loan and Grant Contract executed May 10, 1967, increased total Federal Grant to $3,333,329.00 and the loan to $5,908,880.00.

5th Amendatory to the Loan and Grant Contract executed [3] June 9, 1970, did not change the loan or grant amount but did change allowable interest rate under the contract terms.

6th Amendatory to the Loan and Grant Contract executed September 14, 1970, increased the total grant to $8,318,497.00 and increased the project temporary loan to $13,223,939.00. The purpose of this amendment was to provide for redevelopment of an additional 31.2 acres.

7th Amendatory to the Loan and Grant Contract executed September 20, 1972, increased the total grant by $1,553,370.00 for a total grant of $10,436,717.00 and increased the project temporary loan by $1,533,370.00 for a total loan of $14,757,309.00. This amendment provided for increased costs of project activities but did not increase the project area.

8th Amendatory to the Loan and Grant Contract executed November 27, 1973, increased the total grant by $1,800,000.00 for a total grant of $12,236,717.00 and increased the project temporary loan by $1,800,000.00 for a total of $16,557,309.00. The purpose of the amendment was to provide for increased cost of project activities and did not provide for an increase in the project area.

9th Amendatory to the Loan and Grant Contract executed August 2, 1974, increased the total grant to $12,527,017.00 and increased the project temporary loan to $16,847,609.00. This amendment was to provide for increased cost of the project activities and did not provide for an increase in the project area. (See Affidavit of Julian A. Fitzhugh.)

C. That on July 22, 1975, HUD issued its Final Environmental Impact Statement for the Santa Rosa Center Project (California R-45). (See affidavit of Julian A. Fitzhugh.)

D. That on or about November 14, 1974, defendant Santa Rosa Urban Renewal Agency, pursuant to the Loan and Grant application approved on July 10, 1970, requested HUD to concur in the minimum disposition price on Phase II parcels of approximately 21 acres, [4] and to approve the land disposition agreement to be executed by defendant Hahn and defendant Santa Rosa Urban Renewal Agency. (See Affidavit of Julian A. Fitzhugh.)

E. That on or about November 7, 1975, after a review of the appraisals pertaining to the aforesaid 21 acres of land, HUD concurred that the minimum disposition price for the Phase II land to be devoted to a regional shopping center should not be less than Two Million Dollars ($2,000,000.00). HUD further interposed no objection to the execution of the land disposition agreement referred to in D above. (See affidavits of Leevern Johnson and Julian A. Fitzhugh.)

III ISSUES

The issues presented in this litigation are:

A. Does plaintiff, a municipal entity located approximately seven miles away from the Santa Rosa Center Project have standing to bring this action?

B. Whether or not the Court has jurisdiction of the subject matter insofar as it relates to plaintiff's allegations that the defendants are acting in violation of the Sherman Anti-Trust Act 15 U.S.C. § 1 *et seq.*?

C. Is the Federal defendant in volation of the National Environmental Policy Act of 1969. 42 U.S.C. § 4321, *et seq.*?

D. Under the facts alleged in the Complaint, should the Court enjoin the Federal defendant, Secretary of HUD, from taking any action which could cause damage to plaintiff by reason of any violation of the antitrust laws of the United States—15 U.S.C. § 1, 2?

E. Has HUD acted arbitrarily in concurring in the minimum disposition price of $2 Million for 21 acres of land in Phase II of the project?[5]

IV ARGUMENT

A. *Plaintiff has failed to state a cause of action upon which relief can be granted in that the plaintiff does not have standing and therefore no case or controversy exists.*

Plaintiff has failed to establish sufficient facts to give it standing to raise the issues found by the complaint. As heretofore stated, plaintiff is a municipality of the State of California located approximately 7 miles from Santa Rosa. Furthermore, plaintiff alleges that it, its inhabitants, taxpayers and property owners have been injured in their business and property (Complaint paragraph II). The test to determine this threshhold question is well established. The test requires that plaintiff meets two criteria:

1. Has plaintiff suffered "injury in fact"; and
2. Is plaintiff's interest arguably within the zone of interests to be protected or regulated by statute or constitutional provision.

See: *United States v. SCRAP* 412 U.S. 669, 686 (1973): *Sierra Club v. Morton* 405 U.S. 723, 733 (1972): *Association of Data Processing Services Organizations, Inc. v. Camp* 397 U.S. 150, 152-153 (1970); *Gibson & Perin Co. v. City of Cincinnati* 480 F.2d 936 (C.A. 6, 1973) *cert. den.* 414 U.S. 1068; *Community Hospital Corp. v. Southern Maryland Medical Center* 374 F. Supp. 450 (D. Med., 1974) affirmed 516 F.2d 1037 (C.A. 4, 1975) *cert. den.* 422 U.S. 1048

1. *Plaintiff has no standing under NEPA.*

No where in plaintiff's complaint is it alleged nor can any inference be shown therefrom that plaintiff is even remotely interested in the environment. On the contrary, plaintiff has, in essence, alleged that it will be financially injured by competition in the event that 21 acres of Phase II land is devoted to and developed into a regional shopping center. [6]

The purpose of NEPA was well enunciated in *Pizitz, Inc. v. Volpe* 2 ELR 20373 affirmed 467 F.2d (C.A. 5, 1972) wherein the Court held that NEPA is to impose upon Governmental agencies an awareness of the environment; it "was not designed to prevent loss of profits." In *Zlotnich v. District of Columbia Redevelopment Land Agency* 2 ELR 20235 (D. D.C., 1972) affirmed *per cur.* 494 F.2d 1152 (C.A. D.C. 1974) the Court dismissed an injunctive action for lack of standing where plaintiffs' motivation was to protect their own financial interests. There the Court stated:

> "To have standing grounded on a federal statute plaintiffs must assert an interest 'arguably' within the zone of interests to be protected or regulated by the statute . . . in question.' *Association of Data Processing Serv. Organizations, Inc. v. Camp* 397 U.S. 150, 153 (1970);

Blackhawk Heating & Plumbing Co. v. Driver, U.S. App. D.C., 433 F. 2d 1137, 1140 (1970). Plaintiffs can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment. They have nothing but their own financial interest to protect as their continuing efforts to achieve financial settlement."

And in *Community Hospital Corp. v. Southern Medical Center, supra.*, in holding that the plaintiff had no standing under NEPA said:

"Plaintiff first asserts standing as a competitor to SMMC. Despite all the references to the environment, it is apparent that plaintiff's real aim is not to improve the quality of life for this and future generations, but rather to prevent the building of a competitive hospital by highlighting the disadvantages of the competitor's site near an existing air base. While showing a real injury, this status is not within the area protected or regulated by NEPA."

In view of the above, plaintiff, whose concern is purely financial, has no standing to challenge the Federal defendant's actions pertaining to NEPA. Nor does plaintiff—although not alleged in the Complaint—have standing to challenge the adequacy of the EIS. (as noted above and discussed hereafter the Federal defendant has prepared a final EIS for the Santa Rosa Center project.

2. *Plaintiff does not have standing to challenge an Urban Renewal Plan.*

In *Gibson and Perin Co. v. City of Cincinnati*, 480 F.2d 932, *cert. den.*, 414 U.S. 1068 (1974) (6th Cir., 1973), a case which [7] closely parallels this case on its facts, a redevelopment scheme in Urban Cincinnati was held not to violate anti-trust laws. Although the Secretary and Regional Director of the Department of HUD were originally defendants, later voluntarily dismissed by plaintiffs, the claims of the plaintiffs correspond to those of Rohnert Park, to wit, conspiracy, fraud, violation of State and Federal civil rights and anti-trust laws, ". . . and with everything else they could think of including the charge of depriving them of due process of law and the equal protection of the law. They asked for injunctive relief and damages." at 939

The plaintiffs in *Gibson, supra*, were owners of property *outside* the area covered by the plan, much like Rohnert Park is, although they were merely across the street, as opposed to seven miles away.

The Court immediately found that the plaintiffs lacked standing to challenge the project.

"No cases have been cited to us by the Court or by the parties, nor have we found any cases, where persons located outside the Urban Renewal area have been permitted to question the design or location of buildings approved by the agency (the City, in the present case) as being in conformity with the Plan, said agency having been authorized by Congress to act." *Gibson* at 941

Then the Court stated no standing was conferred by the economic injury resultant from the redevelopment plan, under the Administrative Procedure Act.

"The Act [*sic*, APA] does not confer standing to seek judicial review upon anyone who suffers economic injury as a result of agency action, regardless of whether that person's private rights have been invaded. *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir., 1970); *Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency*, 310 F.2d 99 (7th Cir., 1962) *Id.*

As to the plaintiffs' claims of having standing under their status as taxpayers, the Court dismissed this claim by distinguishing *Data Processing Service v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970), by stating: [8]

> "Both cases involved persons within the zone of interests protected which is not true in the present case as plantiff(s) businesses were located outside the urban renewal area. Since they had no money invested in the structures located within the urban renewal area, they had no personal interest or stake in the project." at 942

To close their discussion of plaintiffs' standing, the Court stated that the plaintiffs must establish that they have a legal interest to maintain the suit, that they had not any, and:

> "Whatever damages plaintiffs sustained as a result of the urban renewal project are *damnum absque injuria.*" at 945

As to the allegations of anti-trust violations, the Court summarily disposed of this claim.

> "Participation in an urban renewal project does not violate the anti-trust laws. The anti-trust claims are frivolous." at 946

The fact that plaintiff city claims that because of the decision to build in Santa Rosa, there will not be a building of a similar shopping center in Rohnert Park, does not state a basis upon which relief can be granted. The resultant "freeze" on development in Rohnert Park is certainly a speculative claim, as well as a failure of plaintiff to allege any facts upon which this is based. Speculative claims do not meet the judicial requirement of standing. See *Simon v. Eastern Kentucky Welfare Rights Organization et al., etc.* ..... U.S. ..... United States Law Week (June 1, 1976) 44 LW 4724, 4729-30.

The foregoing discussion and case law clearly establishes the plaintiff has no standing to bring this action or any part thereof.

B. *The Court lacks subject matter jurisdiction over the antitrust counts of plaintiff's Complaint.*

A thorough review of plaintiffs' Complaint fails to reveal any allegation that the defendants herein are acting to restrain trade or commerce among the several states, (interstate commerce) or with foreign nations. Other than the naked allegation of the [9] above (paragraph VII(d) of the Complaint), plaintiff in paragraph IXa of the Complaint alleges that a substantial part of all merchandise sold in retail outlets in Sonoma County is imported into Sonoma County from states other than California and from foreign countries; however, the gravamen of the Complaint is found in paragraph XII wherein plaintiff restricts its allegations of antitrust violations to only Sonoma County and to this end alleges that it will be deprived of retail tax revenues (paragraph IV(d) of Complaint). The facts in instant case are analogous to those in *Sapp v. Jacobs* 408 F. Supp. 119 (S.D. Ill., 1976). That case also involved an alleged violation of the antitrust laws, 15 U.S.C. § 1, *et. seq.*, in connection with the construction of Regional shopping center. There, in holding that subject matter jurisdiction was absent on the antitrust claims the Court at page 131 said:

> "Again, assuming the same premises and scope of the Act, and accepting the estimates of more than $50,000,000 anticipated retail sales volume, and of more than 50% of such merchandise reaching the ultimate retailers through interstate commerce, and assuming

that the consuming public would be expected to be in some manner touched by those operative facts, plaintiffs' assertion of a jurisdictional base becomes wholly nebulous. In this regard, they espouse a position which is deemed to be a patent misconstruction of Section 4 of the Clayton Act. 15 U.S.C. § 15.

and at page 132:

"The court has, nevertheless, herein considered plaintiffs' position based upon the relationship of interstate commerce to the eventual retail activity at White Oaks. Even so, this complaint when fleshed out for all asserted theories, with all asserted facts admitted, does not set forth any basis for federal antitrust jurisdiction." [10]

"In summary, the asserted facts when uncontested require the conclusions that plaintiffs' activities in the premises were not "in" interstate commerce, and that any effect of the defendants' acts upon interstate commerce is too tenuous and remote to invoke the court's jurisdiction. It has been aptly observed that most localized activity does have some remote effect upon interstate commerce, but that some "'de minimis' factor must intervene or federal regulation is boundless." *Rasmussen v. American Dairy Association,* 472 F.2d 517, 526 (9th Cir., 1972), *cert. denied,* 412 U.S. 950, 93 S. Ct. 3014, 37 L.Ed. 2c 1003.

We submit that interstate commerce is not invoked in the instant case and therefore in view of *Sapp, supra,* and the cases cited therein it is clear that the Court lacks subject matter jurisdiction over the antitrust counts of the complaint and should therefore be dismissed.

However, assuming but without conceding the plaintiff does have the requisite standing, and subject matter jurisdiction exists, we will illustrate below that plaintiff is not entitled to any relief in this case.

C. *Is the Federal defendant, Secretary of HUD, in violation of the Environmental Policy Act of 1969?*

As set forth in the affidavit of Julian A. Fitzhugh, HUD has prepared a Final Environmental Impact Statement for the Santa Rosa Center Project. We therefore submit that the court must conclude that HUD is and has acted in compliance with NEPA. The court's attention is invited to Memorandum dated March 29, 1976, of the United States Court of Appeals for the Ninth Circuit in the case of *Codding Enterprises v. James T. Lynn et al.,* No. 74-3048 wherein the Court dismissed an appeal on the instant project as moot because HUD had prepared an environmental statement for the Santa Rosa project. A copy of the aforesaid Memorandum is attached for ease of reference. [11]

D. *Under the facts alleged in the Complaint should the Court enjoin the Federal defendant, Secretary of HUD, from taking any action which could cause damage to plaintiff by reason of any violation of the antitrust laws of the United States—15 U.S.C. § 1, 2?*

No where in the Complaint do we find any specific allegation that the Federal defendant is acting to restrain interstate trade or commerce. Plaintiff merely alleges (paragraph VII of Complaint) that an agreement between the municipal defendants and defendant Hahn entered into an agreement with knowledge and consent of the defendant Secretary. In this connection it is to be noted that HUD was not nor is a party to any agreement between defendants Santa Rosa and Hahn. HUD's administrative role in any redevelopment project which pertains to a land disposition agreement as herein involved is merely to review the document to insure that it meets with HUD require-

ments. (See affidavit of Julian A. Fitzhugh. Moreover, in the recent case of Alphin v. Henson, 392 F. Supp. 813, 826 (D. Md., 1975), in discussing Governmental immunity from the antitrust laws the Court, at page 826 stated:

> "It has been held that the antitrust laws are aimed at private action, not at Governmental action; that states, cities and Governmental agencies cannot be held liable for violations of the antitrust laws; and that restraints of trade which arise from *valid Governmental action* cannot give rise to private antitrust liability. (emphasis added.) [*Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943); *Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52 (1 Cir., 1966); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F. 2d 25 (1 Cir. 1970); *Ladue Local Lines, Inc. v. Bi-State Development Agency,* 433 F.2d 131 (8 Cir., 1970); *Padgett v. Louisville and Jefferson County Air Board,* 492 F. 2d 1258 (6 Cir., 1974); and cases cited in those opinions.]

See also *State of New Mexico v. American Petrofina Inc.,* 501 F.2d 363 (C.A. 9, 1974).

There can be no question that any urban renewal project, even it if includes a shopping center is a "valid governmental action." [12] In *Berman v. Parker,* 348 U.S. 26 (1954) at p. 34, 35 the Court held:

> "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. *Gohld Realty Co. v. Hartford,* 141 Conn. 135, 141-144, 104 A. 2d 365, 368-370; *Hunter v. Redevelopment Authority,* 195 Va. 326, 338, 339, 78 S. E. 2d 893, 900-901. Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power."

In the instant case the inclusion to the renewal project of the additional 31.2 acres including 21 acres for a shopping center was necessitated by the blighted and deteriorated conditions resulting from an earthquake in Santa Rosa. Such a catastrophic situation does in fact give rise to valid governmental action. Certainly HUD participation in this project does not give rise to any violation of the antitrust laws. As stated in *Gibson, supra,* page 944, "Participation in an urban renewal project does not violate the antitrust laws."

Accordingly, we submit that plaintiff is not entitled to injunctive relief based upon the alleged violation of the antitrust laws. More simply stated, plaintiff's allegations do not rise to the dignity of any antitrust violations.

E. *Has HUD acted arbitrarily in concurring in the minimum disposition price of $2 Million for 21 acres of land in Phase II of the project?*

Title 42 U.S.C. § 1460(c)(4) provides that disposition of any property acquired in an urban renewal area be disposed of at its fair value for uses in accordance with the renewal plan. In this case it is contemplated that the defendant renewal agency will sell to defendant Hahn 21 acres of land in Phase II of the project for a price not less than $2 Million. The land involved will be used as a part of a shopping center. Under HUD regulations, the [13] renewal agency is required to obtain appraisals to determine the fair value of the land to be disposed. (see attached, paragraph 22 and 23 of Chapter 3 of HUD's Urban Renewal Handbook.) As evidenced by the Affidavit of Leevern John-

son the defendant agency did obtain appraisals of the 21-acre area of Phase II land and the appraisals were reviewed by competent real estate appraiser David L. Lane. M.A.I. of Sacramento. Mr. Lane also appraised the 21 acres. His appraisal as well as others were reviewed by Mr. Leevern Johnson in order to assure that HUD appraisal requirements had been met. Based upon a field review of the 21 acres and the comparable sales relied upon by the appraiser HUD concurred in the disposition price of not less than $2 Million. (The actual appraisals were less than $2 Million.)

HUD's responsibility in connection with a land disposition agreement and concurrence in its price are set forth in the affidavit of Julian A. Fitzhugh. In essence it performs a function of the Executive Branch of the Government in order to insure that Federal requirements are met. In this instance HUD assured itself that proper appraisal methods were used in arriving at the fair value of the land. The competency and qualifications of the appraisers retained by the defendant renewal agency are not disputed. In addition, HUD, although not a party, reviewed the disposition agreement between the renewal agency and Hahn to insure that it met HUD requirements.

It is clear that HUD has properly performed its review functions to protect the Government's interests. Further, the actions and determinations of HUD could not be called arbitrary; on the contrary they are purely within its discretionary powers. In this connection and under the circumstances involved herein we submit that the Court should not substitute its judgment for that of the defendant Secretary. See *Berman v. Parker, supra. Louisiana v. McAdoo,* 243 U.S. 627, 633 (1914) *Rural Electrification* [14] *Administration v. Northern States Power Company,* 373 F.2d 686, 700 (C.A. 8, 1967).

CONCLUSIONS

For the foregoing reasons plaintiff's Complaint should be dismissed or summary judgment should be entered in favor of the Federal defendant.

DATED: August 20, 1976.

Respectfully submitted,

JAMES L. BROWNING, JR.
United States Attorney

By: PAUL E. LOCKE
Paul E. Locke
Assistant United States Attorney

Attorneys for Federal Defendants [15]

URBAN RENEWAL HANDBOOK
7214.1 REV
LAND MARKETING AND REDEVELOPMENT
Chapter 3

CHAPTER 3. DETERMINATION OF DISPOSAL PRICE

22. *Minimum Disposal Price.* Unless sold for low or moderate income housing at the Section 107 valuation, or dedicated, as authorized for certain public purposes, urban renewal land shall be disposed of at a price not less than its fair reuse value. The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan.

23. *Number of Appraisals.* Except as described in subparagraphs a, b and c below, each disposal parcel must be appraised independently by at least one competent professional appraiser in private practice. If the fair reuse value of a parcel exceeds $25,000, or if the Agency believes more than one appraisal is desirable, it shall obtain two appraisals of the parcel. If two or more appraisals are obtained, one may be performed by a competent staff appraiser of the Agency. The provisions of this paragraph assume that all Agency appraisals will be reviewed (see paragraph 33) by a fully qualified real property appraiser.

a. If the parcel to be appraised is a fragment of vacant land not separately buildable in accordance with the Urban Renewal Plan, one appraisal by a qualified appraiser in private practice or on the staff of the Agency is sufficient.

b. HUD shall, upon request from the Agency, determine the fair reuse value of property to be sold for low or moderate income housing under the Section 107 valuation (see paragraph 24 below). There will be no fee charged to the urban renewal project for such HUD appraisal.

c. If the parcel is fully (100%) eligible as a project improvement and dedicated in accordance with paragraph 29 below, it need not be appraised.

24. *Section 107 Appraisal of Sites for Low or Moderate Income Housing.* As described in paragraph 23b above, HUD will determine the value of property to be sold for low or moderate income housing under the provisions of Section 107 of the Housing Act of 1949, as amended.

a. *Definition of Section 107 Valuation.* The Section 107 valuation is the maximum price that would be paid for the property by a well-informed, prudently acting buyer, who is motivated solely by the objective of meeting the housing needs of low or moderate income families or individuals rather than by profit or gain, and who is not controlled or directed or influenced in his decisions, by persons or firms seeking to derive profit or gain from the undertaking. [9]

FILED

Mar 29 1976

Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

No. 74-3048

Codding Enterprises,
Plaintiff-Appellant,

vs.

James T. Lynn, Secretary, Department
of Housing and Urban Development;
Robert H. Baida; James H. Price;
Julian Fitzhugh, et al.,
Defendants-Appellants.

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and WALLACE, Circuit Judges,
and EAST,* District Judge

Codding Enterprises brought this action to enjoin the Department of Housing and Urban Development from financing the construction of a large shopping center in Santa Rosa, California, until an environmental impact statement is filed as required by 42 U.S.C. § 4332(2)(c). The district court found that the plaintiff lacked standing

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

to enforce the National Environmental Policy Act and dismissed the action. Codding appealed. Since then, HUD has prepared and submitted the environmental statement.

The appeal is moot. The judgment appealed from is vacated and the case is remanded with directions to dismiss the action as moot.

Appendix G(1)

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
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Santa Rosa and Urban Renewal Agency
of the City of Santa Rosa

United States District Court
Northern District of California

NO. C74-2429 RHS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS OF DEFENDANTS CITY OF SANTA ROSA AND THE URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA

TO PLAINTIFF AND TO WILLIAM M. BRINTON AND RICARDO J. HECHT, ITS ATTORNEYS:

PLEASE TAKE NOTICE that on September 24, 1976, at 9:30 a.m. or as soon thereafter as counsel may be heard, in Courtroom 5 of the above entitled court located at 450 Golden Gate Avenue, San Francisco, California, defendants City of Santa Rosa and the Urban Renewal Agency of the City of Santa Rosa, will move the court for an order dismissing the complaint and entering summary judgment in favor of defendants and against plaintiff.

This motion is made under Federal Rule of Civil Procedure 56(b) on the ground that the action raises no genuine issue as to any material fact and the City of Santa Rosa and the Urban Renewal [1] Agency of the City of Santa Rosa are entitled to judgment as a matter of law and the ground that the court lacks subject matter jurisdiction.

This motion is based on this notice, the pleadings, records, and files herein, on the affidavits of James K. Burns, Richard E. Brandt and Joseph E. Coomes, Jr. and the memorandum of points and authorities filed in support of this motion, and on the proposed summary judgment filed herewith.

Dated: August 20, 1976.

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By RICHARD E. BRANDT
Richard E. Brandt
Attorneys for Defendants [2]

Appendix G(2)

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City of Rohnert Park, a municipal corporation,
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vs.
James T. Lynn, as Secretary of the United States Department of Housing and Urban Development; City of Santa Rosa, a municipal corporation; Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc. a California corporation,
Defendants.

BRIEF OF DEFENDANTS CITY OF SANTA ROSA AND URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [1]

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I. STATEMENT OF THE CASE

This action by the City of Rohnert Park against James T. Lynn, Secretary of the United States Department of Housing and Urban Development ("HUD"); the City of Santa Rosa, and the Urban Renewal Agency of the City of Santa Rosa (hereinafter sometimes collectivey referred to as "the Santa Rosa defendants"); and Ernest W. Hahn, Inc., ("Hahn") seeks to enjoin the defendants from spending public funds, approving or participating in the sale of land, or taking any other action to authorize or carry out the proposed construction of a regional shopping center as part of a Santa Rosa central business district urban renewal project. Approximately 20 acres of the 30-acre shopping center site are within an area of the project referred to as "Phase II," that has received federal assistance under a loan and grant contract between HUD and the Urban Renewal Agency (now known as the Housing and Redevelopment Agency and hereinafter referred to as "the Agency"). The shopping center is to be constructed by Hahn, in acordance with conditions established by a contract between Hahn and the Agency ("the Hahn Contract") conveying the land of the shopping center site. The Hahn contract has two complex alternatives, either of which may be elected by the Agency, solely at its own discretion. The contract requires, among other things, that Hahn pay the Agency $2 million for land in Phase II, bear a majority of the costs of constructing a multi-million dollar public parking facility, and subject its development of the property to review by the Agency for compliance with the contract.

The City of Rohnert Park claims that the Hahn contract violates the Housing Act of 1949 (42 USC 1460 [c] [4]), HUD regulations (Urban Renewal Handbook 7214.1 Rev. Ch. 1, p. 1, Ch. 3, p. 9), and the California Community Redevelopment Law (Health and Safety Code, Section 33433) as a sale of property for less than allegedly required by the statutes and regulations; that HUD is [2] violating the National Environmental Policy Act (42 USC, Sections 3431, et seq.) by failing to prepare an environmental impact statement ("EIS") for the federally assisted part of the project; and that the regional shopping center development, including the Hahn contract, the proposed use of the tax allocation method of financing the local public costs of redevelopment, and "subsidy" effect of past or proposed governmental actions, violate Sections 1 and 2 of the Sherman Act (15 USC 1 and 2).

This Motion for Summary Judgment and Motion to Dismiss of the Santa Rosa defendants is based, in part, on government and judicial actions which have occurred since this suit was filed in November of 1974. Because the pleadings do not fully describe the present status of the matters allegedly in dispute, the immediately following section of this brief summarizes the material facts, which are set forth and explained in further detail in the affidavits of James K. Burns, Richard E. Brandt and Joseph E. Coomes, Jr. submitted in support of the motions.

A. *Summary of Facts*

The original redevelopment plan for the Santa Rosa Center project was adopted by Santa Rosa City Council Ordinance No. 1036 on December 5, 1961. The original project area of approximately 40 acres is referred to as Phase I. After an earthquake in October of 1969 damaged prop-

erty in downtown Santa Rosa, the City Council, by Ordinance No. 1436, amended the redevelopment plan to add approximately 31 acres now referred to as Phase II.

During late 1972 and early 1973 Mr. Burns, the Executive Director of the Agency, investigated whether private developers might be interested in developing a shopping center in the portion of Phase II which at that time had not been committed to other purposes. In February of 1973, after confirming such interest, the Agency authorized placement of newspaper advertisements soliciting requests to participate in such development from [3] experienced regional shopping centers developers. After prospective developers were interviewed and screened, Hahn was tentatively selected, and the Agency authorized an agreement for a period of exclusive negotiations. Negotiations, including planning and feasibility studies, continued through two extensions of the original negotiating period and ultimately culminated in a predisposition agreement approved by the Agency on August 6, 1973. By this interim agreement, Hahn agreed to construct the shopping center on the condition, among others, that the redevelopment plan be amended to include the area now referred to as Phase III within the project.

In late 1973 and 1974 the Agency staff and its expert consultants conducted the detailed studies required by the California Community Redevelopment Law to insure that Phase III qualified for redevelopment. This process of evaluation was completed in a series of noticed public hearings in October of 1974. At hearings held on October 16 and October 29 the Agency considered, and certified as completed in compliance with the California Environmental Quality Act (CEQA), an environmental impact report (EIR) for the redevelopment project and shopping center.

On the latter date the Agency also conducted a noticed hearing at which it tentatively approved the Hahn contract, subject to HUD concurrence. On the same day the City Council, in joint session with the Agency, considered two amendments to the redevelopment plan. One amendment, which was adopted on that date as Ordinance No. 1741, added Phase III to the project. The other amendment provided for the closing of certain streets and alteration of traffic patterns in Phase II to accommodate the shopping center. Since Phase II received federal support through the loan and grant contract, the City Council deferred final action on the second amendment, pending concurrence by HUD.

On November 19, 1974, the City of Rohnert Park filed this [4] suit. Shortly thereafter a Validating Proceeding, the exclusive means of contesting a redevelopment project in the California courts, was instituted in the Sonoma County Superior Court against the redevelopment plan amendment adding Phase III to the project. The Validating Proceeding was filed by Codding Enterprises, the principal owner of the regional shopping center site in Rohnert Park which is the principal basis of plaintiff's asserted interest in this suit. By separate suit in the Sonoma County Superior Court Codding Enterprises challenged the validity and adequacy of the EIR prepared for the project.

After the filing of these suits, the Santa Rosa defendants were informed by HUD that it would not concur in the Hahn contract or in the redevelopment plan amendment for Phase II until an EIS had been completed. A draft EIS was circulated to interested parties for their comments in the late spring of 1975; the review process of the final EIS was completed in September. Thereafter, HUD concurred with the Phase II plan amendment, and on Novem-

ber 4, 1975, the City Council adopted the amended Phase II plan as Ordinance No. 1791.

At about the same time the EIS was completed, the Agency commissioned David Lane, M.A.I., to prepare an updated reuse appraisal (i.e., an appraisal assessing the value of land after it has been acquired and cleared by the Agency but subject to the restrictions of the redevelopment plan) for the property to be sold to Hahn. The Lane reuse appraisal confirmed, as did two previous reuse appraisals and a previous summary of appraisals by Mr. Lane himself, that the price to Hahn specified by the Hahn contract exceeded the fair market value of the shopping center site and its fair value for uses in accordance with the plan. All of these appraisals were submitted by the Agency to HUD which, after an independent examination and field review by its own real estate expert, Mr. Leevern Johnson, informed the Agency in early [5] November of its concurrence in the Hahn contract and the disposition price for Phase II land. At a noticed public hearing on December 1, 1975, the Agency considered the concurrence of HUD, the Lane appraisal, and the testimony of Mr. Lane and others, and gave its final approval to the Hahn Contract. Plaintiff was separately informed of the hearing date through counsel at the deposition of Mr. Johnson on November 11, 1975, but plaintiff did not appear or present evidence on the value of the site sold to Hahn, although more than a year had passed since it first alleged inadequate consideration from Hahn by the filing of this suit.

On or about December 31, 1975, Codding Enterprises filed a second in rem Validating Proceeding in the Sonoma County Superior Court to contest the Phase II plan amendment adopted by the City Council on November 4, 1975. The suit was later consolidated with the in rem Validating

Proceeding on the plan amendment adding Phase III, the suit against the project EIR referred to above, and a suit by Codding Enterprises challenging a City application to HUD for community development funds allocated to the City for fiscal year 1975 and an EIR for the application. The City proposed to use part of the funds for land acquisition and clearing and relocation costs in Phase III.

The four consolidated suits were tried in May of 1976 before the Honorable J. Hilary Cook, specially assigned to the Sonoma County Superior Court. On July 28, 1976, Judge Cook filed a Notice of Intended Decision (Exhibit E to Affidavit of Richard E. Brandt) indicating that he intended to find the redevelopment plan amendments and the Santa Rosa defendants' actions to develop the proposed shopping center valid and in compliance with applicable laws. As is hereafter explained, all issues purportedly raised by this suit, except those concerning the obligations of HUD under NEPA were litigated in the Superior Court proceeding which, as an in rem action, will be binding on plaintiff City of Rohnert Park [6] when it becomes final.

The lawsuits described above are but four of a dozen suits commenced since April of 1973 that have been either filed or financially supported by Codding Enterprises to contest the development of a regional shopping center in the redevelopment project. In each of the eight such lawsuits not described in this brief, Codding Enterprises or the party it financially supported has been denied all relief at the trial court level. One appellate decision has been rendered against Codding Enterprises, and three cases remain pending on appeal. Codding Enterprises is the owner of the only existing integrated regional shopping center in Sonoma County and the owner with Cofego Enterprises of the potential shopping center site in Rohnert

Park which plaintiff in this suit claims is the source of its interest and concern in the redevelopment activities of the Santa Rosa defendants. Codding Enterprises is also an owner of Cofego Enterprises. According to the testimony of Peter Callinan, City Manager of plaintiff, and Arthur Hollingsworth, past president of the Rohnert Park Chamber of Commerce, which is described in the Affidavit of Joseph E. Coomes, Jr., as of early May, 1975, Codding Enterprises and Cofego Enterprises had contributed all of the funds expanded by plaintiff for attorneys' fees in this suit.

The relevance to this suit of the Codding actions and the relationship between plaintiff City and Codding Enterprise, in addition to the prospective res judicata effect on Rohnert Park of the in rem proceeding instituted by Codding, is that the relationship and the lawsuits show an identity of interests between plaintiff and Codding Enterprises in that the injury plaintiff complains of in this case is derivative of the economic consequences of Santa Rosa redevelopment on the attempts of Codding Enterprises to develop a regional shopping center in Rohnert Park. This denouement of the matters in dispute assists the demonstration [7] that plaintiff's claims are without merit because it shows that the only difference between the plaintiff's position and that of the competitor such as Codding, allegedly disadvantaged by redevelopment is the plaintiff's position is more remote from the economic and other impacts of the defendants redevelopment and more hypothetical in imagining a legal injury. Numerous judicial decisions have found that the disadvantage competition has no suit against redevelopment based on the allegations of illegality here made by Rohnert Park. *A fortiori*, Rohnert Park, which claims to be indirectly injured by a supposed

direct injury to such disadvantaged competitors has no merit to its case.

B. *Summary of Arguments*

The Santa Rosa defendants submit that the court must dismiss this suit at to them and that they are entitled to Summary Judgment as a matter of law and plaintiff's claims raise no genuine issue of material fact. The suit should be dismissed because plaintiff lacks standing to sue for violation of NEPA, the Federal Housing Act of 1949, HUD regulations, the Health and Safety Code or the Sherman Act. Dismissal of plaintiff's Sherman Act claims is also required because the court lacks subject matter jurisdiction in that the activities complained of, as a matter of law, are not interstate commerce and do not affect interstate commerce. As to the Santa Rosa defendants, the court is barred from exercising jurisdiction over any claims of plaintiff purportedly founded on an alleged sale of land to Hahn for inadequate consideration, violation of anti-trust laws, or violation of state law, because these issues have previously been litigated in an in rem state court proceeding which will be binding on plaintiff and any exercise of jurisdiction by this court would wrongfully interfere with the state court's jurisdiction.

Apart from infirmities of lack of standing and lack of jurisdiction, the Santa Rosa defendants are entitled to judgment [8] as a matter of law because the claims of plaintiffs raise no genuine issue as to any material fact. There is no violation of NEPA because HUD has prepared an EIS. The federal statute and regulation and the state statute referred to by plaintiff impose no obligation of the Santa Rosa defendants with respect to the adequacy of

consideration from Hahn. In any event, the Santa Rosa defendant's action cannot be challenged on that ground because the administrative record of their proceedings on the Hahn contract establishes as a matter of law that their finding that the consideration was adequate is supported by substantial evidence. Finally, plaintiff's allegations of violation of the Sherman Act are without merit. The activities complained of are sovereign, governmental actions in accordance with the mandate of state law and for that reason are immune from application of the Sherman Act. The economic consequences of valid governmental action cannot give rise to liability under the Sherman Act.

II. ARGUMENTS

A. *The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims Purportedly Based On Alleged Violation Of The Sherman Act*

The court has subject matter jurisdiction over plaintiff's claim brought under the Clayton Act (15 USC 26) for violation of section 1 and 2 of the Sherman Act only if the activities alleged to violate these antitrust laws occur within the flow of interstate commerce, or if they occur locally and in intrastate commerce, but substantially affect interstate commerce. *Sapp v. Jacobs,* 408 F.Supp. 119 (1976) S.D.Ill. (1976). *Burke v. Ford* 389 U.S. 320, 321, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967); *Las Vegas Merchant Plumbers Assn. v. United States* 210 F.2d 732, 739 (9th Cir. 1954), cert den. 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645; *DeVoto v. Pacific Fidelity Life Insurance Company* 516 F.2d 1, 4 (9th Cir. 1975). The gravemen of plaintiff's antitrust claim is that the expenditures of the Santa Rosa defendants and the federal [9] government for the redevelopment project will give Hahn a competitive advantage over Codding Enterprises or whoever else may try to develop the potential shopping center site in Rohnert Park and discourage and inhibit Codding or other developer from building a shopping center at the Rohnert Park site because of the threat of competition from Hahn. Plaintiff views the purpose and effect of the Santa Rosa shopping center as follows: (Complaint, paragraph VIII)

> (a) To enhance and render impregnable the already dominant position which Defendant City and its merchants have in the retail merchandising industry in Sonoma County generally and more specifically in the Santa Rosa Trade Area:
>
> (b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;
>
> (c) To enhance Defendant City's already large share of retail sales tax dollars collected in Sonoma County and to increase the burden of property taxes in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners;
>
> (d) To unduly restrain the trade and commerce among the states and with foreign countries.

Almost identical claims were considered by the court in *Sapp v. Jacobs, supra,* and were found to not involve matters "in" interstate commerce or substantially affecting interstate commerce. The plaintiff in *Sapp* argued that the development of such a regional shopping center was in interstate commerce because tenants were solicited from out of state. Responding to that argument, the court stated:

> The premise must fail. Plaintiff's activities were geared to the development of real estate in Illinois

> for the purpose of providing a regional center, through the facilities of which persons other than themselves would engage in the intrastate retail sale of merchandise. That wholly local activity does not become an activity "in interstate commerce" simply by reason of the fact that they did solicit prospective tenants from other states.

The court then reviewed a litany of decisions holding that commercial real estate development was not a matter within the [10] purview of the Sherman Act, noting that only in *Goldfarb v. Virginia State Bar* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) had real estate transactions been found potentially subject to the Sherman Act and there only because of the interstate financing of the particular transactions involved. Rohnert Park has not alleged that development of the potential shopping center site in its jurisdiction involves interstate financing nor is there any evidence to support such a claim.

The court in *Sapp* also rejected the argument that the development of a regional shopping center had a substantial affect on interstate commerce, and in particular, refused to accept the assertion that retail activities of the future tenants of such a shopping center in interstate commerce justified application of the Sherman Act to the activities of the developing the shopping center. In the words of the Court:

> Plaintiffs' theory of jurisdiction, attaching by reasons of the anticipated substantial volume of retail sales which the ultimate development of White Oaks is anticipated to generate, is novel in two respects. First, it relies upon a prospective effect upon interstate commerce which will not occur until some unfixed time in the future. Secondly, in light of the fact that plaintiffs are not, within the context of complaint,

> engaged in retail merchandising, their assertion of their injury must be vicariously tied to an anticipated prospective effect which will fall upon persons other than themselves. No case is found which has sustained antitrust jurisdiction upon a like premise. *Sapp v. Jacobs,* 408 F.Supp. 119, 130 (1976).

The court also rejected the suggestion that usurpation or monopoly of the opportunity to develop gave rise to an action or claim. The court stated:

> It is obvious that the burden, if any, which would arise from the fact that White Oaks will be the only available shopping center, falls upon the consuming public and, possibly, upon retailers who are in the market for mall space in the market area. The restraint of such burden cannot descend as a vicarious mantle around the plaintiffs to convert a presumed injury to other persons into an injury to the plaintiffs in their use and enjoyment of real estate. Id. at 131.

Finally, the court concluded:

> In summary, the asserted facts when uncontested require the [11] conclusions that plaintiffs' activities in the premises were not "in" interstate commerce, and that any effect of the defendants' acts upon interstate commerce is too tenuous and remote to invoke the court's jurisdiction. It has been aptly observed that most localized activity does have some remote effect upon interstate commerce, but that some " 'de minimis' factor must intervene or federal regulation is boundless". Id. at 132.

That the incidental and remote relationship between a use or development of real estate and the flow of goods in interstate commerce does not justify application of the Sherman Act is also supported by numerous other cases. See *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d

742 (9th Cir. 1936), cert. den. 299 U.S. 613, 81 L.Ed. 452, 57 S.Ct. 315; *Monument Bowl, Inc. v. Northern California Bowling Proprietors Assn.,* 197 F.Supp. 208 (N.D. Cal. 1961), *Marston v. Ann Arbor Property Management Assn.* 302 F.Supp. 1276 (D.Mich. 1969); *St. Anthony—Minneapolis, Inc. v. Red Owl Stores* 316 F.Supp. 1045 (D. Minn. 1970).

The plaintiff admits that the relevant market is only a small part of California, Sonoma County and the Santa Rosa trade area. (Complaint, Par. VIII). The complaint itself shows the development activities at issue in this suit and the local tax revenue and other economic consequences alleged to flow from such activities, are uniquely local and intrastate in their effect and concern. Plaintiff's remedy, if any, for restraint of trade therefore must be under state antitrust law such as the Cartwright Act.

B. *The Court Is Barred From Exercising Jurisdiction Over Plaintiff's Claims Against The Santa Rosa Defendants Based On Alleged Sale Of Land For Inadequate Consideration And Alleged Restraint Of Trade, Monopoly And Attempt To Monopolize Because To Do So Would Interfere With The In Rem Jurisdiction Of The Sonoma County Superior Court.*

The California Community Redevelopment Law provides a remedy for any party, such as the city of Rohnert Park, which claims to be aggrieved by a redevelopment project. Section 33501 of the California Health and Safety Code states: [12]

> An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

Chapter 9 of the Code of Civil Procedure (Sections 860-870) entitled "VALIDATING PROCEEDINGS" establish detailed procedures to resolve in a single lawsuit all complaints against, and challenges to the validity of, a redevelopment project. Section 860 states:

> A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. *The action shall be in the nature of a proceeding in rem.* (Emphasis added)

Section 863 provides that private parties may resort to the procedures of validating proceedings when a suit is not instituted by a public agency.

In *City of Ontario v. Superior Court,* 2 Cal.3d 335, 446 P.2d 693, 85 Cal.Rptr. 149 (1970) the California Supreme Court held that the provisions of Chapter 9, Title 10 of the Code of Civil Procedure, taken as a whole, required the con-

clusion that the validating proceedings is the exclusive means by which a plaintiff can contest a decision of a public agency concerning a redevelopment project. The Court explained:

> The public's opportunity to challenge those decisions, moreover, is commensurately restricted by this legislation. Section 863 of chapter 9 [13] provides that if the public agency does not initiate validating proceedings, 'any interested person may bring an action within the time and in the court specified by Section 860 of this chapter to determine the validity of such matter.' This seems innocuous enough, until one reads section 869: 'No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified.
>
> In other words, while section 863 says that an interested person "may" bring such an action, section 869 says he must do so or be forever barred from contesting the validity of the agency's action in a court of law.
>
> (*City of Ontario v. Superior Court, supra,* p. 341).

The rule of *City of Ontario* that failure of an interested party to challenge a redevelopment project in a validating proceeding bars any attempt to contest a redevelopment project in a separate suit was reemphasized in *Plunkett v. City of Lakewood,* 44 Cal.App.3d 344, 116 Cal.Rptr. 885 (1975).

Validating proceedings were instituted in Sonoma County Superior Court against both the Phase III redevelopment plan amendment and the Phase II plan amendment. The allegations of Rohnert Park in this action that the consideration of the Hahn contract is inadequate and in violation of 42 USC 1460(c)(4), Urban Renewal Handbook 7214.1 Rev.,

Ch. 1, p. 1, and Health and Safety Code Section 33433 and that the Hahn contract, tax allocation financing, and other financial arrangements for development of the shopping center of the Santa Rosa project violated the antitrust law were litigated in the trial of the validating proceedings on May 17, 18, and 19, 1976. (See, First Amended Complaint, Exhibit A to Affidavit of Richard E. Brandt). On July 28, 1976, Judge J. Hilary Cook filed his Notice of Intended Decision indicating that he will rule in favor of the Santa Rosa defendants on the issues litigated and find the amendments to the redevelopment plan and the redevelopment activities of the Santa Rosa defendants to be valid public actions. (See, Exhibit E to Affidavit of Richard E. Brandt). Under California law a judgment [14] in an in rem proceeding, such as a validating proceeding, is res judicata and binding on all persons whether or not they were personally before the court. *Crall v. Poso* Irr. Dist. 87 Cal. 140, 26 P. 797 (1890); see also, 4 *Witkin,* Cal.Proc.2d, Judgment, Section 180, pp. 3321-3332, and Section 236, pp. 3369-3370.

Rohnert Park is now to be barred by the 60-day period of limitations for a validating proceeding from litigating in state court the claims made in this suit; when the judgment in the validating proceedings becomes final, Rohnert Park will also be barred from litigating its claims by the doctrines of res judicata and collateral estoppel. The bar of res judicata and collateral estoppel arising from a decision in the state court also bars an action in the federal courts, both on issues of state law and issue of federal law. See *Township of Hopewell v. Volpe,* 446 F.2d 167 (1971).

Although the decision of the validating proceedings is not yet final, this court is nonetheless barred from entertaining Rohnert Park claims against the Santa Rosa defendants because the state court proceeding was an in rem

action and Rohnert Park will be bound by the judgment. A collateral attack on the validity of the acts of the Santa Rosa defendants in this suit is barred the fundamental principle of federal jurisdiction that a federal court cannot entertain an in personam action, such as this suit by Rohnert Park, or grant declaratory or injunctive relief where to do so would create a conflict between a state in rem judgment and the federal judgment. Phrased in slightly different terms:

> The general rule that the jurisdiction of a court, state or federal, having in rem or quasi in rem control or disposition of specific property cannot be interfered with, and that this rule involves a principle of necessity and leaves nothing to discretion, applies as well to declaratory actions as to other proceedings.
>
> (*Moore's Federal Practice,* 2d Ed., Vol. 1A, Part 2, ¶ 0.220, p. 2605). [15]

The res before the Superior Court for Sonoma County, as defined by Health and Safety Code Section 33501 quoted above, consisted of all the redevelopment activities of the Santa Rosa defendants challenged in this suit. The purpose of the validating proceeding was to determine all claims involving the redevelopment project, to achieve the conclusive determination of legality essential to proceeding with financing and the complex transaction of a redevelopment project. By finding the amended redevelopment plan valid, the state court necessarily found that the proposed shopping center development could not be declared invalid or enjoined based on the alleged inadequacy of consideration from Hahn for the shopping center site or the antitrust claims made here by Rohnert Park. Insofar as this action seeks declaratory and injunctive relief against the Santa Rosa defendants it asks for a remedy which cannot

be granted without conflicting with the in rem jurisdiction of the state court and with the intended decision announced by the state court. The in rem nature of the state court's judgment requires that this court dismiss this suit against the Santa Rosa defendants. See *Burbridge Foundation, Inc. v. Reinholdt & Gardner,* 496 F 2d 326 (CA8 1974); *Moore's Federal Practice,* 2d.Ed., Vol. 1A, Part 2 ¶ 0.214, p. 2507, Note 25 and cases cited therein.

In *Gart v. Cole,* 263 F.2d 244 (2d Cir. 1959), cert. den. 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed. 2d 929, the court of appeal, on the basis of the full-faith-and-credit clause of the United States Constitution, refused to entertain claims involving the sale of property to a developer similar to the claims raised here by Rohnert Park. The court held that the plaintiffs-appellants were barred from relitigating issues of federal law in the District Court when barred from doing so in the state court by the state law regarding class actions. Their action was barred even though the plaintiffs-appellants had not themselves been parties to the [16] state court action. In reaching its decision, the court reasoned with reference to the earlier state:

> All [appellants] had ample notice of the suit; parties plaintiff there had no interests contrary to appellants in this action; and the same counsel prosecuted both suits. To the general rule that only persons subject to a court's jurisdiction are bound by its judgment, there has long been an exception for suits of a representative character.

The interests of Codding Enterprises in the validating proceeding were in complete consonance with those of Rohnert Park. Rohnert Park cannot deny knowledge of the pendency of the state court proceeding or that it had the opportunity to be a party. All of the reasons for respecting

the state class action rule in *Gart v. Cole* equally support respecting the in rem jurisdiction of the state court in this suit by dismissal of the action against the Santa Rosa defendants.

C. *The Court Is Barred From Entertaining Any Claim Against The Santa Rosa Defendants Based on State Law.*

Plaintiff's challenge to the adequacy of consideration from Hahn for the shopping center site is based in part on an alleged violation of Section 33433, Health and Safety Code. Although the complaint does not appear to directly allege any other violation of state law, plaintiff insinuates that the Santa Rosa defendants are acting without state law authority in proposing to use tax allocation financing and are permitting development inconsistent with the Santa Rosa General Plan.

On matters of state law the federal court must apply the decisions of state courts as its rules of decision. 28 U.S.C. 1652. This principal pertains to questions of state law before a federal district court on the basis of pendant jurisdiction, as Rohnert Park's state law claims are in this case. *Briskin v. Glickman,* 267 F.Supp. 600 (DC NY 1957). The federal courts are bound by state decisions which foreclose the maintenance of suit because of the bar of the statute of limitations or lack of [17] jurisdiction. *Guaranty Trust Co. v. York,* 326 US 99, 89 L.Ed. 2079, 65 S.Ct. 1464 reh den. 326 US 860, 90 L.Ed. 491, 66 S.Ct. 7.

The courts of the State of California have held that they have no jurisdiction to entertain a suit alleging invalidity of redevelopment activities except in accordance with the provisions on validating proceedings in the Code of Civil Procedure and that the 60-day period within which such

an action may be instituted is in the nature of a statute of limitations for all suits against a redevelopment project. *City of Ontario v. Superior Court, supra; Plunkett v. City of Lakewood, supra.* These decisions bar Rohnert Park from contesting the redevelopment activities of the Santa Rosa defendants based on state law in state courts. A federal court may enforce state law only when the state provides that a plaintiff has a right to do so. *Voutrey v. General Baking Co.,* 39 F.Supp. 974 (E.D. Penn. 1941). Rohnert Park cannot sue to enforce state law in this court because it is barred from doing so in the state court.

D. *Plaintiff's Allegation That The National Environmental Policy Act (NEPA) Has Been Violated By A Failure To Prepare An Environmental Impact Statement (EIS) Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *An EIS has been Prepared for the Urban Renewal Project.*

The affidavit of James K. Burns and the affidavits of the federal defendants establish that an EIS has been prepared by HUD for the Santa Rosa urban renewal project. Assuming for the sake of argument that HUD was required to prepare such an EIS, all issues concerning that obligation have now been rendered moot.

2. *Failure of the Federal Defendants to Comply with NEPA Cannot Justify an Injunction or Declaratory Relief Against the Santa Rosa Defendants.*

Even if the federal defendants had failed to comply with NEPA such failure cannot justify the enjoining of the Santa Rosa defendants or Hahn from proceeding with the shop-

ping center [18] development proposed for the project. NEPA is a federal statute that imposes an obligation upon the agencies of the federal government to prepare an EIS in specified circumstances. (42 USC 4332). The federal courts have repeatedly held that actions of state and local government agencies and private individuals cannot be enjoined or challenged for alleged violations of NEPA either by such local agencies or by federal agencies. *Ely v. Velde,* 451 F2d 1150 (CA4 VA 1971); *Bradford Township v. Illinois State Toll Highway Authority,* 463 F2d 537 (CA7 ILL. 1972) cert.den. 409 U.S. 1040, 34 L.ed.2d 499, 93 S.Ct. 518; *Northeast Area Welfare Rights Organization v. Volpe,* 2 ERC 1704 (DC WASH 1971); *Boston v. Volpe,* 464 F2d 254 (CA1 MASS. 1972); and *Miltenberg v. Chesapeake N.O. R.CO.,* 450 F2d 971 (CA4 MD 1971); *Proelta v. Dent,* 484 F.2d 1146 (CA2 NY 1973). State government defendants have been enjoined in connection with a federal agency's failure to comply with NEPA only when the acts of the state agency will irrevocably commit the federal agency to a project that is primarily federal in the sense that the project is financed principally by the federal funds and would not take place but for the "major federal action" that invokes the requirement for preparation of an EIS. *La Raza Unida v. Volpe,* 337 F.Supp. 221 (DC Cal. 1971) cert den. 409 U.S. 890, 34 L.Ed.2d 147, 93 S.Ct. 105.

The financing plans and arrangements described in the affidavit of James K. Burns and the attached Report to City Council irrefutably demonstrate that the proposed shopping center development is not such a federal project. The unexpended federal source funds budget of approximately $1.6 million is but a small part of the estimated $15,070,300.00 of remaining Phase II public costs, and it is dwarfed by the private costs of more than $40 million to be

borne by Hahn. Even this comparison over-emphasizes the federal involvement in the shopping center development. As Burns [19] states in his affidavits, of the budgeted uses of federal funds only the $400,000.00 allocated to street improvements has even a remote relation to the shopping center reuse of the project area, and even these improvements would probably be necessary for any other reuse. The Agency is not entitled to any additional federal funds under the loan and grant contract, and HUD has informed the Agency that no more funds will be furnished.

The Agency and the City are empowered by the state law and by the redevelopment plan to raise and spend funds for the public costs of the redevelopment and to carry out the project without any federal participation whatsoever. That, in effect, is what the Agency is doing for Phase III. Tax allocation bonds issued by the Agency under authority of state statute (Health and Safety Code, Sections 33760-33674) and the California Constitution (Article XVI, Section 16) have been proposed as a source of funds to pay the public costs of the areas redevelopment.

The present involvement of HUD in the Santa Rosa project consists of federal review to insure compliance with long-existing obligations of the loan and grant contract. The Ninth Circuit, in a case involving redevelopment in San Francisco, expressly refused to find that such residual federal involvement constitutes major federal action for purposes of NEPA. The court analysed such federal review as follows:

> Appellants argue that the June 26, 1970 and April 28, 1972 amendatory grants to the San Francisco Redevelopment Agency and HUD's contractual right to monitor the project as it develops to assure compliance with statutory and contractual requirements constituted major federal actions subsequent to the passage of NEPA. We hold otherwise.

[4] Amendatory contracts which increase the federal funding only to provide for the rising costs of land acquisition and relocation of displaced residents do not constitute "further major federal action" within the meaning of the Act. Instead, such amendments represent but confirmation of the Federal Government's earlier decision that the project proposal conformed to HUD requirements and was therefore eligible for a grant and loan. The major federal action was the execution of the initial grant and loan contract which occurred over four years before the effective [20] date of NEPA. Monitoring the project only assures HUD that the undertakings of SFRA under its contract of December 2, 1966 will be fulfilled and involves no further major federal action.

Appellant's strong reliance on highway cases in which courts have found major federal actions requiring environmental impact statements under NEPA is misplaced. *San Francisco Tommorow v. Romney,* 472 F.2d 1021, 1025 (1973).

Santa Rosa cannot be characterized as a "federal" project as that designation is used to identify those projects where actions of state agencies can be enjoined pending compliance with CEQA. Phase I and earlier development in Phase II may have involved major federal action but the future activities Rohnert Park now seeks to enjoin clearly are not. As in *City of Boston v. Volpe, supra,* federal involvement in past stages of the project, stages unrelated to the shopping center development at issue in this case, cannot justify the enjoining of what is now essentially a local government venture.

Finally, based on the allegations made by Rohnert Park in its complaint, it appears that plaintiff lacks standing to sue for violation of NEPA. The impacts and consequences of the activities complained of are clearly economic and fiscal in nature. Such concerns are not within the zone of interests protected by NEPA and cannot confer standing to institute suit based on the act. *Clinton Community Hospital Corp. v. Southern Maryland Medical Center,* 374 F.Supp. 450 (D.Md. 1974).

E. *Plaintiff's Allegation That The Land Is Being Sold to Hahn For Less Than Adequate Consideration In Violation of 42 U.S.C. 1460(c)(4), The Urban Renewal Handbook, And Section 33433, California Health And Safety Code Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *Plaintiff Lacks Standing to Sue.*

Rohnert Park does not claim to be a party to any contract or agreement concerning the redevelopment project, that it owns property within the project, that it has a business or other interest that will be relocated from the project area, or that it is a taxpayer of the City of Santa Rosa. Plaintiff merely [21] alleges that if a regional shopping center is constructed in the redevelopment project of Santa Rosa, it will discourage the development of a similar center at a location in Rohnert Park and cause attendant adverse economic consequences to plaintiff, such as loss of taxes, and that if the tax allocation financing authorized by state law is used to finance the public cost of redevelopment, the expected increase in property tax revenues from redevelopment will not immediately inure to benefit of plaintiff and other taxing entities in Sonoma County. The excerpt from the deposition of plaintiff's City Manager, Peter Callinan, shows that plaintiff's only proprietary interest in the Rohnert Park shopping center site is the ownership of a parcel held for future use as a library site.

The federal courts have consistently held that persons not parties to the loan and grant contract between the local agency and the federal government, and who are not property owners within the project entitled to specific benefits, such as relocation payments, granted by the Housing Act of 1949, have no judicially cognizable interest and no standing to sue for an alleged failure to comply with the Act. The United States Court of Appeals for the Sixth Circuit, in a case closely resembling this one, except that the plaintiff was not a government entity, affirmed this principle in a suit involving a redevelopment project of the City of Cincinnati. The court stated:

> The Act does not confer standing to seek judicial review upon anyone who suffers economic injury as a result of agency action, regardless of whether that person's private rights have been invaded. *Woodland Market Realty Co. v. City of Cleveland,* 426 F.2d 955 (6th Cir. 1970); *Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency,* 310 F.2d 99 (7th Cir. 1962). (*Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 941 [1973]).

The court rejected the argument that recent cases expanding the category of persons entitled to sue under other laws required a departure from past cases limiting standing purportedly based [22] on the Housing Act of 1949 to the parties to the loan and grant contract:

> In our case no review was provided by statute of acts of agencies and private developers of Urban Renewal projects. We think it was because review would frustrate implementation of Urban Renewal plans and would discourage cities and redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project.

> In our case, under no stretch of the imagination can it be claimed that plaintiffs, who were located outside the Urban Renewal area, were within the zone of interests protected by the statute. Since they had no money invested in the structures located in the Urban Renewal area, they had no personal interest or stake in the project. (*Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936, 942 [1973]).

Recently, in *Warth v. Seldin* (422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 [1975]), the United States Supreme Court reached a conclusion consistent with that of the court in *Gibson & Perin Co.* and also rejected the suggestion that indirect economic consequences resulting from the local tax structure—such as the tax allocation impacts here complained of by Rohnert Park—invaded judicially cognizable interests. In *Warth v. Seldin* the Court refused to hold that zoning action of a suburban town that allegedly increased taxes in the adjacent city of Rochester gave taxpayers of Rochester standing to sue for asserted violation of their constitutional rights. The Court stated:

> The petitioners who assert standing on the basis of their status as taxpayers of the city of Rochester present a different set of problems. These "taxpayer-petitioners" claim that they are suffering economic injury consequent to Penfield's allegedly discriminatory and exclusionary zoning practices. Their argument, in brief, is that Penfield's persistent refusal to allow or to facilitate construction of low- and moderate-cost housing forces the city of Rochester to provide such housing in greater numbers than it otherwise would do; that to provide such housing, Rochester must allow certain tax abatements; and that as the amount of tax-abated property increases, Rochester taxpayers are forced to assume an increased tax burden in order to finance essential public services.

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP,* 412 US 669, 688, 37 L.Ed.2d 254, 93 S.Ct. 2405 (1973). We think the complaint of the taxpayer-petitioners is little more than such an exercise. Apart [23] from the conjectural nature of the asserted injury, the line of causation between Penfield's actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

But even if we assume that the taxpayer-petitioners could establish that Penfield's zoning practices harm them, their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester.

(*Warth v. Seldin,* 45 L.Ed.2d 343, 360-361).

The same considerations of the court in *Warth v. Seldin* dictate a determination that plaintiff lacks standing in this suit.

2. *The Santa Rosa Defendants Are Not Obligated by the Federal Regulation or the State or Federal Statutes.*

Regardless of plaintiff's entitlement to sue for alleged violation of 42 USC 1460(c)(4), the Urban Renewal Handbook, and Health and Safety Code, Section 33433, as a matter of law, plaintiff is not entitled to any remedy against the Santa Rosa defendants. Because the federal laws and regulations are mandates to the federal administration, not the local agency, the only possible remedy for violation of

the federal requirement is against the federal defendant. The state requirement does not apply to the Santa Rosa defendants because the property in question was not purchased from the proceeds of a redevelopment revolving fund.

Both state and federal courts have held that the proper method of enforcing judicially cognizable grievances arising from loan and grant contracts is by petition to the federal administrator and not by suit against the local Agency. In *Johnson v. Redevelopment Agency of the City of Oakland,* 317 F.2d 872 (9th Cir. 1963) plaintiff argued that the local agency could be sued directly because the loan and grant contract imposed essentially the same obligation on the agency with respect to relocation as that imposed on the federal agency by the Housing Act. The Ninth [24] Circuit Court of Appeals denied this proposition with the following words:

> We find no indication that Congress intended this section of the Housing Act to give a right of action to those not a party to the contract between the Redevelopment Agency and the United States. This provision is but one of many obligations imposed upon the Redevelopment Agency by the United States as a condition to the granting of redevelopment funds and loans. Because of the complexity of urban renewal and the expertise of the Adminstrator of the Federal Housing and Home Finance Agency, Congress delegated to the Administrator the duty of enforcing the conditions of the Loan and Capital Grant Contract required by the Housing Act. See *Hunter v. City of New York,* Sup., 121 N.Y.S.2d 841 (1953).

But, argues appellant, since the contract contained substantially the same requirements as Section 1455(c), they are third party beneficiaries under California law. This is not true because the contract, involving an

agency of the United States and controlled by federal statutes, is governed by federal law. *Johnson v. Redevelopment Agency of the City of Oakland,* 317 F.2d, 872, 874 (1963).

The California Supreme Court has also found that questions concerning a redevelopment agency's compliance with the requirements of the Housing Act of 1949 or a loan and grant contract are matters delegated solely to the federal agency and that a third party cannot sue a city or agency for allegedly illegally spending funds in violation of the federal law. *In re Redevelopment Plan for Bunker Hill* (61 Cal.2d 21, 75-76; 37 Cal. Rptr. 74, 389 P.2d 538 [1964]) the Court adopted the position of a New York court that:

> "If the city is improperly spending or contemplates spending funds contributed toward the project by the National Housing and Home Finance Agency, it is a matter for the consideration and concern of the federal administrator and not for the plaintiff and, on this feature, the court is of the view that the plaintiff is without legal capacity to sue." (See also *Gart v. Cole* (2d Cir. 1959) 263 F.2d 244, 250 [8], cert. den. 359 U.S. 978 [79 S.Ct. 898, 3 L.Ed.2d 929]; *Pittsburgh Hotels Assn., Inc. v. Urban Redevelopment Authority* (D.C. W.D. Penn. 1962) 202 F.Supp. 486, 492-493 [8], *Harrison-Halstead Community Group, Inc. v. Housing & Home Finance Agency* (7th Cir. 1962) 310 F.2d 99, 103-105 [2-5], in each of which cases it was held that the plaintiffs therein had no standing to litigate questions under the Housing Act of 1949, as amended.) *Shipley v. Smith* (1940) 45 N.M. 23 [107 P.2d 1050, 131 A.L.R. 1225], cited and relied upon by the Goldmans on this point, was an action to enjoin [25] payment of money from the county treasury and in no way dealt with the expenditure of federal funds by a state agency. *In re Redevelopment Plan for Bunker Hill,* 61 Cal.2d 21, 75-76 (1964).

The assertion that the Santa Rosa defendants have breached Health and Safety Code Section 33433 is also without merit as a matter of law. Section 33433 provides:

> No real or personal property, or any interest therein, acquired or constructed in whole or in part with money from the redevelopment revolving fund shall be sold or leased for an amount less than its fair value for uses in accordance with the redevelopment plan as determined by resolution or ordinance of the legislative body.

A redevelopment revolving fund as referred to in the statute is a special fund created by appropriation of the City in accordance with Section 33620 and 33621 of the Health and Safety Code. No such revolving fund has been established by the Santa Rosa defendants.

3. *As a Matter Of Law, The Action Of The Santa Rosa Defendants Cannot Be Challenged For Alleged Inadequacy Of Consideration From Hahn Because The Finding Of The Urban Renewal Agency That The Consideration From Hahn Was Adequate Is Supported By Substantial Evidence Contained In The Record Of The Agency's Hearings On The Hahn Contract.*

The Community Redevelopment Law charges the Agency with the responsibility for carrying out the redevelopment plan. (Health and Safety Code Section 33372). The Agency's exercise of its powers and discharge of its duties can be challenged only for abuse of discretion; action within the scope of its official responsibilities cannot be questioned in the courts if supported by substantial evidence before the Agency. *In re Bunker Hill, supra,* pp. 37-40; *Berggren v. Moore* 61 Cal.2d 347, 38 Cal.Rptr. 722, 392 P.2d 522 (1964). This rule of law applies to the Agency's decision that the Hahn contract is supported by adequate consideration.

Judge Cook has announced he intends to find that:

> The agency's finding that the Hahn contract was [26] fair and equitable for the land according to its value for reuse and was not less than its fair value for uses in accordance with the redevelopment plan is supported by substantial evidence contained in the record.

The record referred to by the Judge is the administrative record before the court in the validating proceeding, the same record that is attached to in the affidavit of Mr. James Burns, filed in support of these motions. That record shows not only that the Agency's finding as to the value of the shopping center site is supported by substantial evidence, as found by Judge Cook, but also that, as a matter of law, no other conclusion is permissible based on the evidence presented before the Agency. Mr. Burns' affidavit indicates that the Agency obtained several reuse appraisals on the property and all of them supported the conclusion that the consideration of the Hahn contract was adequate. The final appraisal by Mr. David E. Lane was presented to the Agency at its hearing on December 1, 1975, before it gave its final approval to the Hahn contract. No conflicting evidence was presented.

At the deposition of Mr. Leevern Johnson in this case, plaintiff's counsel were informed of the time and purpose of the noticed public hearing on the Hahn contract. Nonetheless, the record of that hearing shows they failed to appear or present evidence on the matter of the adequacy of consideration by Hahn. The attorney representing Codding Enterprises appeared and objected to the adequacy of consideration but presented no evidence. Rohnert Park cannot now question that evidence supporting the Agency's finding or challenge its veracity unless it was for some reason deprived of an opportunity to present evidence

before the Agency. The published notice of hearing, the personal notice to counsel for Rohnert Park, and the fact that more than one year elapsed betwen the time Rohnert Park filed this lawsuit charging inadequate consideration and the time the Agency considered the [27] matter at its hearing on the Hahn contract belie any argument that Rohnert Park should now be allowed to contest the adequacy of the Hahn consideration after it failed to do so before the Agency.

F. *Plaintiff's Allegation That The Hahn Contract, The Expenditure Of Public Funds For The Urban Renewal Project, And The Proposed Use Of Tax Allocation Financing Violate Sections 1 and 2 Of The Sherman Act Raises No Genuine Issue Of Material Fact As To The Santa Rosa Defendants.*

1. *Plaintiff Lacks Standing To Sue For Any Alleged Violation Of The Sharmen Act.*

The City of Rohnert Park can sue under Section 4 of the Clayton Act (15 USC, Section 15) only if it can demonstrate injury to its business or property. The deposition of Peter Callinan, plaintiff's City Manager, which has previously been referred to, establishes that plaintiff's only property at the potential shopping center site in Rohnert Park is a single parcel designated for use as a library site. Plaintiff does not contend that it is engaged in retailing or real estate development; the only economic injury that it complains of is the fiscal impact on its tax revenues that will supposedly result from development of the Hahn shopping center in Santa Rosa. Plaintiff cannot found its entitlement to sue upon the alleged injury to its citizens and taxpayers; absent a direct injury to its property or business interest

Rohnert Park has no standing to sue, *Hawaii v. Standard Oil Co.* 405 US 251, 31 L.Ed.2d 184, 92 S.Ct. 885 (1972).

2. *The Redevelopment Activities Of The Santa Rosa Defendants, Including The Expenditures Of Public Funds, The Use Of Tax Allocation Financing, And The Resale Of Land For Commercial Reuse, Such As The Proposed Hahn Shopping Center, Are Sovereign Acts For A Public Purpose And For That Reason Are Immune From The Sherman Act.*

Rohnert Park complains that the Hahn contract and the proposed method of financing Santa Rosa project through tax allocation bonds violate the antitrust laws by subsidizing the shopping center development, thereby placing developers who wish to locate [28] in Rohnert Park at a competitive disadvantage and diverting to the City of Santa Rosa tax revenues that otherwise would be shared by Rohnert Park. Assuming for the sake of argument that the redevelopment activities of the Santa Rosa defendants directly effect Rohnert Park, they are, nonetheless, actions clearly immune from the antitrust laws both as acts done in a sovereign capacity and as acts directed by mandate of the state legislature through the Community Redevelopment Law.

State government and its subdivisions are immune from the federal antitrust laws with respect to acts in a sovereign capacity and acts done in accordance with the mandate of state law. *State of New Mexico v. American Petrofina, Inc.* 501 F 2d 363 (CA 9th Cir. 1974); *Goldfarb v. Virginia State Bar* 421 US 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975). The Santa Rosa defendants are immune for both reasons.

The Community Redevelopment Law declares:

> "The redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and *are governmental functions of state concern in the interest of health, safety and welfare of the people of the State* and of the communities in which the areas exist. (Health and Safety Code Section 33037[c])." (Emphasis added)

The procedures the Agency must follow in carrying out redevelopment are regulated in detail by the statute to accomplish the purposes of the state legislature. In *Fellom v. Redevelopment Agency,* 157 Cal.App.2d 243, 320 P 2d 884 (1958) the court explained the role of the local agency in rejecting the appellant's arguments that the redevelopment law was unconstitutional as legislation by the state on a matter of municipal concern and an unlawful delegation of a legislative power from the Board of Supervisors of a county to the redevelopment agency with the following analysis: [29]

> It must be remembered that redevelopment, when enacted by the state, is a matter of state interest, and its implementation is in order to effect a state objective. The California Housing Authorities Law is particularly apposite here, since that law gives to housing authorities certain powers as public bodies corporate and politic and not as agents of the city in which they function. '[T]he local operation of an act of general state-wide scope may be made contingent upon determination by local authorities that conditions there require its acceptance and operation.' (*Housing Authority v. Dockweiler,* 14 Cal.2d 437, 446 [94 P.2d 794].) The language used in *Housing Authority v. City of Los Angeles,* 38 Cal.2d 853, 861-862 [243 P.2d 515], is persuasive here: 'Similarly the city under the Housing Authorities Law is an agency of the State, functioning under state law to fulfill state purposes,

and is not acting pursuant to its fundamental law to effect solely municipal objectives. [Citation.] Each functioning body, the city and the housing authority, is a seperate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law. In pursuing the state objective each is governed by the state law and either may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective.' *Fellom v. Redevelopment Agency, supra,* pp. 247-248.

The principle that local government through the redevelopment agency and city council acts as the administrative agent of the state when proceeding under the Community Redevelopment Law was acknowledged by the California Supreme Court *In re Redevelopment Plan of Bunker Hill, supra,* where at page 52 the Court stated:

> In our view *Redevelopment Agency v. Hayes,* (1954), *supra,* 122 Cal.App.2d 777, correctly sets forth the law relating to the delegation of power to a redevelopment agency when it adopts *Belovsky v. Redevelopment Authority* (1947) 357 Pa. 329 [54 A.2d 277, 283, 172 A.L.R. 953], and quotes therefrom at page 807 [20] as follows: " 'The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation . . . . All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the [30] power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act.' "
>
> Although *Hayes* dealt with an agency power to determine blight, the principle announced appears equally applicable to the agency power to effectuate redevelopment.

The principle that a redevelopment agency acts as the administrative arm of the legislature was recently affirmed in *Gibbs v. City of Napa,* 59 Cal.App.3d 148 (1976), ... Cal. Rptr. .....; and *Walker v. City of Salinas,* 56 Cal.App.3d 711 (1976), 128 Cal.Rptr. 832.

The United States Supreme Court has also recognized that redevelopment is a governmental function and thus a proper exercise of the sovereign power of government. *Berman v. Parker,* 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954). Both state and federal courts have recognized that redevelopment is a function of government, a sovereign activity for which public funds may be spent. For that reason the redevelopment activities Rohnert Park objects to are immune from the Sherman Act.

Plaintiff's allegation that Hahn, a private party, will derive a special advantage from redevelopment adds nothing. The expenditure of public funds and local tax revenues to purchase land for resale for private commercial development is a fundamental purpose of the government of redevelopment. Health and Safety Code Section 33036 contains

a legislative determination that the condition of blight cannot be remedied by private enterprise without assistance from government because "private assembly of the land and blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of a legal power and excessive costs." The legislature has further declared in Section 33037(b): [31]

> That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

The foregoing statutes constitute the mandate of the state to the Santa Rosa defendants to accomplish redevelopment in precisely the manner objected to by Rohnert Park.

Bunker Hill, supra, the principal California Supreme Court case on redevelopment, rebuts the sugggestion of Rohnert Park that a benefit or advantage to private enterprise deprives redevelopment of its public purpose and governmental legitimacy. The State Supreme Court approved an earlier conclusion of Court of Appeal that:

> *Housing Authority v. Dockweiler, supra,* 14 Cal.2d 437, adopted the broader interpretation as the rule to be followed in this state. It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone. . . . In California our courts have followed the broader definition of 'public use' and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership subject to restrictions protecting the public use, does not make it any the less a public use. . . . *Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. Redevelopment Agency v. Hayes,* 122 Cal.App.2d 777, 802-804, 266 P.2d 105 (1954). (Emphasis added)

Redevelopment agencies are also expressly authorized by [32] Article XVI, Section 16 of the California Constitution and Section 33670 through 33674 of the Health and Safety Code to use the tax allocation financing that Rohnert Park complains of in this case. Each aspect of the redevelopment of the Santa Rosa defendants disputed by plaintiff is outside the purview of the antitrust laws both because it is within the scope of the governmental function of redevelopment, as defined by statute and judicial decision, and because it is specifically authorized or directed by state law.

3. *The Economic Consequences Of The Santa Rosa Defendants' Valid Governmental Action Cannot Give Rise To Liability Under The Sherman Act.*

Economic consequences brought about by valid governmental action cannot give rise to liability under the Sherman Act. *American Banana Co. v. United Fruit Co.,* 213 US 347, 358, 53 L.Ed. 826, 29 S.Ct. 511, 16 Ann.Cas. 1047 (1909); *Olsen v. Smith,* 195 US 332, 344, 345, 49 L.Ed. 224, 25 S.Ct. 521 (1904); *Parker v. Brown,* 317 US 341, 351, 87 L.Ed. 315, 63 S.Ct. 307 (1943); *United States v. Rock Royal Co-op., Inc.,* 307 US 533, 560, 83 L.Ed. 1446, 59 S.Ct. 993 (1939); *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.,* 214 F.2d 413 (CA5 Fla, 1954).

With respect to the issues of this suit, the principle is perhaps best exemplified by *Gibson & Perin Co. v. Cincinnati,* 480 Fed.2d 936 (1973). In *Gibson & Perin Co.* the plaintiffs, who owned businesses outside a redevelopment project, charged government discrimination in favor of their private party competitors inside the project area. They claimed, as Rohnert Park does in this suit, that the design and construction of a parking facility within the project gave a special benefit to merchants there and placed them at a competitive disadvantage. As in this case, the plaintiffs' pleading alleged that the parking facility was approved pursuant to an unauthorized change in the redevelopment plan for [33] the project and "in addition, . . . charged the defendants with violation of their civil rights, conspiracy, fraud, violation of federal and state antitrust laws, and with everything else that they could think of including the charge of depriving them of due process of law and the equal protection of the laws." *Gibson & Perin, supra,* p. 939.

On appeal, the United States Court of Appeal, Sixth Circuit, reversed a judgment partially in favor of plaintiffs and remanded the case to the trial court with instructions to dismiss the complaint. The Court of Appeal rejected the plaintiffs' claims under the Sherman Act with the concise and unambiguous comment: "Participation in an Urban Redevelopment project does not violate the antitrust laws." *Gibson & Perin Co., supra,* p. 946.

The holding of the Court in *Gibson & Perin Co.* follows numerous judicial decisions holding that activities of government agencies are exempt from application of the antitrust laws even if they restrict or inhibit trade or commerce. *Parker v. Brown,* 317 U.S. 341, 87 L.Ed. 315 (1904); *E. W. Wiggins Airways, Inc. v. Mass. Port Authority,* 362 F.2d 52 (1970). This rules applies equally to the plaintiffs charge that rezoning lawsuit of the Santa Rosa defendants against plaintiff somehow violated the antitrust laws. The testimony of Peter Callinan attached to the affidavit of Joseph E. Coomes, Jr., and the pleadings, which are attached to the affidavit of Richard E. Brandt, reveal that the suit involved substantial issues concerning water and sewer systems of the two cities and the plaintiffs admitted refusal to heed the regional plan of the Association of Bay Area Governments. The suit was completed in less than three months of filing. The matters submitted with the affidavits demonstrate that even if the Santa Rosa defendants had not been immune from the Sherman Act, the impacts of the lawsuit on trade or commerce, if any, must be characterized as insubstantial. [34]

III. CONCLUSION

Plaintiff's objections to redevelopment in Santa Rosa and the regional shopping center proposed for the project echo a theme that has been repeatedly raised by those who feel

their economic opportunity for commercial expansion is threatened by competition from the commercial renewal that is a primary goal of downtown business district Urban Renewal. *Gibson & Perin Co. v. City of Cincinnati, supra; Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency,* 310 F.2d 99 (7th Cir. 1962) and *Pittsburgh Hotels Association v. Urban Redevelopment Authority of Pittsburgh,* 202 F.Supp. 486, 309 F.2d 186 (1962), cert.den, 372 U.S. 916 are but three of many cases dealing with the same economic phenomenon complained of by Rohnert Park in this case. In all such cases the plaintiffs claims have been deemed to be without merit. The only response that can be made is the one given by the court in *Pittsburgh Hotel Association* that the admitted economic consequence of redevelopment is damnum absque injuria.

The questions of government involvement in redevelopment and allocation of tax revenues that plaintiff ask this court to resolve have already been determined by the Congress and the Legislature of the State of California. They are preeminently political issues which, for all the reasons given above, should not and cannot be entertained by this court. Santa Rosa defendants respectfully submit that their Motion to Dismiss and Motion For Summary Judgment should be granted.

DATED: August 20, 1976

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation

By RICHARD E. BRANDT
Richard E. Brandt

Attorneys for Defendants City of Santa Rosa [35]

Appendix H(1)

Filed Oct 19 1976
WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

Alcoa Building, Suite 1400
One Maritime Plaza
San Francisco, California 94111
Telephone (415) 397-4600

Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

vs.

James T. Lynn, etc., et al.,

Defendants.

AFFIDAVIT OF R. DEAN STAHR

State of California } ss.
County of Napa }

R. DEAN STAHR, being first duly sworn, deposes and says:

1. I reside at 7633 Magellan Way in the City of Napa, Napa County, California.

2(a). I am a real estate appraiser, and I have practiced this profession in California continuously since 1955.

(b). I graduated from the University of Washington with a Bachelor's degree in Economics and Business.

(c). I am a member of the American Institute of Real Estate Appraisers and a member of the California Society of Rural Appraisers.

3. I have rendered services as a real estate appraiser [1] to the following, among others:

(a) The United States Department of Justice;
(b) The City of Santa Rosa;
(c) The Urban Renewal Agency of Santa Rosa;
(d) The Santa Rosa School Districts;
(e) The County of Sonoma;
(f) The Pacific Gas & Electric Company.

4(a). I have been requested by the attorneys for the Plaintiff to render an opinion to be included in this affidavit regarding the fair market value of some of the real property located in Phases II and III of the Urban Renewal Area of the City of Santa Rosa for its highest and best uses permitted under the Santa Rosa Urban Renewal Plan.

(b). I have personally visited and visually observed the property comprised within said Phases of the Urban Renewal Plan as well as the property adjacent thereto and I am entirely familiar with it and the conditions which may influence values therein.

(c). I have read the Urban Renewal Plan of the City of Santa Rosa and I have thereby gained knowledge of the land uses permitted thereunder.

5(a). The property which is the subject of the inquiry contains approximately thirty (30) acres of land. Of these, approximately twenty (20) acres are in Phase II, while the balance are within Phase III. Accordingly, said Phases together contain 1,306,800 square feet of land.

(b). In my opinion, as of the date of this affidavit, these thirty (30) acres or 1,306,800 square feet had an average fair market value for the highest and best uses permitted under the Urban Renewal Plan of $5.00 per square foot or a total of $6,534,000.00.

(c). The foregoing opinion is based on facts disclosed [2] by a study made by me of sixty-one (61) sales of comparable land located in or adjacent to the subject area. Forty (40) of these sales, in which the Urban Renewal Agency was not involved, took place between January 15, 1968 and May 1, 1975, while twenty-one (21) such transactions, in which the Urban Renewal Agency was involved, occurred between December 19, 1961 and October 16, 1974.

(d). In making this study I inspected the records kept in the offices of the Recorder and the Assessor of Sonoma County, as well as the records kept in the office of the Urban Renewal Agency. Then, after having noted the pertinent information contained in the records, I communicated with the principals involved in the transactions to ascertain the actual prices paid and the condition of the properties at the time of the sale. In addition, for the purpose of verifying the information received from the principals, I interviewed the brokers who served as intermediaries in the sales.

(e). I have collected in a booklet summaries of the pertinent facts involved in these transactions together with copies of the underlying records which I inspected while making the study. A true copy of this booklet is attached hereto marked Exhibit "A", and made a part hereof.

(f). This study was made originally to serve as the basis of testimony I gave as a witness for the plaintiffs on May 17, 1976, in the Superior Court of Sonoma County, in the consolidated cases of *Codding Enterprises, et al., Plaintiffs v. Urban Renewal Agency of the City of Santa Rosa, et al., Defendants,* Nos. 79465/79762-84237/81799.

6. The facts above set forth are within my personal [3] knowledge, and if called as a witness in this action I would be competent to testify as to the matters stated herein.

R. DEAN STAHR
R. Dean Stahr

Subscribed and sworn to before me
this 14th day of September, 1976.

Dorothy Ransford
Notary Public in and for the County of Napa, State of California. [4]

DOROTHY RANSFORD
Notary Public
Napa County California
My Commission Expires
October 21, 1979

Appendix H(2)

Filed Oct 19 1976

WILLIAM M. BRINTON
RICARDO J. HECHT
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Telephone (415) 397-4600

Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

vs.

James T. Lynn, etc., et al.,
Defendants.

AFFIDAVIT OF ROLAND L. BRUST

State of California
City and County of San Francisco } ss.

ROLAND L. BRUST, being first duly sworn, deposes and says:

I am and have been for approximately two years the Director of Public Works and City Engineer of the City of Rohnert Park, and as such I have the custody and control of the original records concerning the assessment districts within the City created by virtue of resolutions adopted by the City Council and the Board of Supervisors of the Rohnert Park District, a community services district.

Pursuant to the request of Ricardo J. Hecht, an attorney representing the City, I have personally examined these records to determine assessments made and levied on the assessor's parcels which are within the designated commercial area of the [1] City, including the parcels in which mobile home coaches may be installed. Also, pursuant to the request of Mr. Hecht I have had a summary made of what appears in these records by M. Hudis & Associates, consulting engineers of Santa Rosa, California. I have personally reviewed this summary and found that it accurately reflects what appears in said original records. A true copy of said summary, marked "Exhibit A," is attached hereto and made a part hereof.

ROLAND L. BRUST

Subscribed and sworn to before me
this 19th day of October, 1976.
RUBY P. JOHNSON
Notary Public in and for the City
and County of San Francisco, State
of California.

OFFICIAL SEAL
RUBY P. JOHNSON
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission expires Mar. 13, 1979

EXHIBIT A

RECEIVED OCT 1 1976 CITY OF ROHNERT PARK

M. Hudis & Associates/Consulting Civil Engineers

2100 County Center Drive Santa Rosa, California 95401
Telephone (707) 542-8795

September 30, 1976

Mr. Roland L. Brust
City Engineer
City of Rohnert Park
6750 Commerce Blvd.
Rohnert Park, California 94928

Dear Ron:

Enclosed is the information requested by Mr. Ricardo J. Hecht relative to the assessment district proceedings in the commercial areas in the City of Rohnert Park. Please note that we have lumped all of the Cal Tex Equities properties inasmuch as they are all separate individual parcels within the shopping center at the corner of Commerce Blvd. and the Rohnert Park Expressway.

ASSESSMENT DISTRICT 1956-1

A. P. Map No.	Owner	Amount
143–05–16	Rohnert Fred, et al	$ 3,447.00
" " 18	Cofego Enterprises	3,109.00
" " 19	Pahlmeyer, Ralph B. & Helen E.	528.00
" " 20	Leibert, Grant	534.00
" " 26	Forsyth-Clyde	387.00
" " 32	Danna, Dominic F.	1,581.00
" " 33	Poubroy, M. J. & Rosalie	1,356.00
" " 34	McCulloh, Ernest & Wanda	000.00
" " 35	" " "	2,738.00
" " 36	" " "	000.00
" " 37	Bessone, Joseph & Peter	1,205.00
" " 38	" " "	000.00
" " 39	Young, David D. et al	15,336.00
" " 40	" " " "	000.00
" " 41	Cofego Enterprises	16,203.00
" " 42	" "	000.00
" " 43	Caltex Equities	000.00
" " 44	" "	000.00
" " 45	" "	000.00

ASSESSMENT DISTRICT 1956-1
(continued)

A. P. Map No.	Owner	Amount
" " 46	" "	000.00
" " 47	" "	000.00
" " 48	" "	000.00
" " 49	" "	9,729.00
143–05–50	Cofego Enterprises	7,765.00
" " 51	Griner, Thomas E.	2,737.00
" " 53	City of Rohnert Park	000.00
" " 54	Cofego Enterprises	69,982.00
" " 55	City of Rohnert Park	000.00

ASSESSMENT DISTRICT 1965-3

143–05–16	Rohnert Fred, et al	$ 6,717.00
" " 18	Cofego Enterprises	5,866.00
" " 19	Pahlmeyer, Ralph B. & Helen E.	1,024.00
" " 20	Leibert Grant	1,172.00
" " 26	Forsyth-Clyde	1,262.00
" " 32	Danna, Dominic F.	3,226.00
" " 33	Poubroy, M. J. & Rosalie	652.00
" " 34	McCulloh, Ernest & Wanda	000.00
" " 35	" " "	1,620.00
" " 36	" " "	000.00
" " 37	Bessone, Joheph & Peter	5,707.00
" " 38	" " "	000.00
" " 39	Young, David D. et al	11,612.00
" " 40	" " " "	000.00
" " 43	Caltex Equities	
& " " 48	" "	
& " " 49	" "	15,389.00
143–05–50	Cofego Enterprises	$12,708.00
" " 51	Griner, Thomas E.	4,533.00
" " 54	Cofego Enterprises	13,805.00

ASSESSMENT DISTRICT 1968-1

A. P. Map No.	Owner	Amount
143–39–08	Codding Enterprises	$40,521.00
" " 11	Chris C. Knudtsen	8,894.00
" " 12	Codding Enterprises	70,279.00
" " 14	" "	68,844.00
" " 15	Roberts & Aguirre	5,178.00
" " 18	" "	17,333.00
" " 22	Codding Enterprises	8,894.00

ASSESSMENT DISTRICT 1968-1a

143–39–08	Codding Enterprises	$42,470.00
" " 11	Chris C. Knudtsen	4,835.00
" " 12	Codding Enterprises	73,682.00
" " 14	Codding Enterprises	72,626.00
" " 15	Roberts & Aguirre	4,673.00
" " 17	" "	60,888.00
" " 18	" "	17,447.00

ASSESSMENT DISTRICT 1972-7

143–39–14	Codding Enterprises	$95,151.00
" " 22	" "	57,326.00
143–00–38	Rancho Verde	49,259.00

ASSESSMENT DISTRICT 1972-73

143–50–16	Rohnert, Fred et al	$ 4,165.00
" " 20	Leibert, Grant	3,065.00
" " 32	Danna, Dominic F.	1,375.00
" " 33	Poubroy, M. J. & Rosalie	000.00
" " 34	" " "	000.00
" " 35	McCulloh, Ernest N. & Wanda	1,084.00
" " 36	" " "	000.00
" " 37	Bessone, Joseph P. & Peter F.	000.00
" " 38	" " "	000.00
" " 39	Young, David D., et al	13,323.00
" " 40	" " " "	000.00
" " 41	Cofego Enterprises	20,395.00
" " 42	" "	000.00

ASSESSMENT DISTRICT 1974-6

A. P. Map No.	Owner	Amount
143–00–38 &	Rancho Verde	$
143–39–21	" "	75,724.00

If you have any questions please call me at this office.
Yours very truly,

MILTON HUDIS
Milton Hudis
MH:brm

Appendix H(3)

Filed Oct 19 1976

WILLIAM M. BRINTON
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San Francisco, Ca. 94111
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Attorneys for Plaintiff

United States District Court
Northern District of California

CIVIL ACTION NO. C 74 2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, etc., et al.,

Defendants.

AFFIDAVIT OF CLAUDE GRUEN

State of California
County of San Francisco } ss.

CLAUDE GRUEN, being first duly sworn, deposes and says:

1. I am Principal Economist with Gruen Gruen + Associates, 464 Howard Street, San Francisco, California.

2(a). I am an urban economist and I have practiced this profession in California continuously since 1964.

(b). I hold a BBA degree in business administration, an MA and Ph.D. in economics from the University of Cincinnati.

(c). I have served on the faculties of Xavier University in Cincinnati in the Department of Economics, and the University of California at Berkeley in the School of Business Administration, the Department of City and Regional [1] Planning, and the School of Architecture.

(d). I have experience in the analysis of retailing and commercial real estate projects, having prepared marketing and feasibility studies of regional and specialty shopping centers. Included in this experience was the development of the financial real estate analysis that led to the City of Santa Maria calling for the development of a regional shopping center in its downtown.

(e). I have published reports and articles in the field of urban economics, retailing and locational analysis and real estate analysis.

3(a). I have been requested by the attorneys for the plaintiff to render an opinion as to whether the development and operation of a regional shopping center to serve resident households and visitors to Sonoma County in the area around Santa Rosa and Rohnert Park in Sonoma County, California would be developed and operated in interstate trade.

(b). I have reviewed data on taxable retail sales in Sonoma County and have considered the nature of regional centers of the type that would serve a significant portion of the market for retail goods and services in Sonoma County, whether built in Santa Rosa or Rohnert Park.

(c). I have assumed that a regional shopping center to be built in this area would be similar in scale to the center that Santa Rosa Associates proposes to build in Santa Rosa, California. I have read a letter from Teachers Insurance and Annuities Association of America to Santa Rosa Associates (a limited partnership) dated March 18,

1976, which indicates that that center will include a two-level enclosed mall containing 322,000 square feet of mall stores; 20,865 square feet of freestanding buildings; a 91,788 square foot enclosed [2] mall; and 28,000 square feet of service corridors and management offices. I understand that mall is to connect with a 161,342 square foot Sears-Roebuck & Company department store and TBA, a 135,530 square foot R. H. Macy department store, and a 75,600 square foot Mervyn's department store. In addition, I understand that the proposed center in Santa Rosa is to provide sufficient space for 3,675 cars including deck and surface parking.

4. It is my opinion that the development and operation of a regional shopping center of the type Santa Rosa Associates proposes to develop, or one similar to it, would constitute interstate trade. My opinion is based on the following conclusions:

(a). Large retail department stores operated by Sears-Roebuck & Company, the R. H. Macy Company, or similar stores, purchase a significant proportion of the goods they sell from sources outside of the State of California. Smaller department stores and the type of shops that we developed along the mall of such centers also draw partially from their ability to gather in goods from all over the United States and other countries which they then offer for sale to local residents and visitors.

(b). I have read an affidavit prepared by Kenneth Roberts, employee of Ernest W. Hahn, prepared on the fifth day of August, 1976, which discusses the materials to be used in the construction of the regional shopping center that Santa Rosa Associates proposes to build in Santa Rosa. From reliance on that affidavit and previous knowledge concerning the nature of shopping center construc-

tion, it is my opinion that a significant portion of the materials used to build a regional shopping center in Sonoma County will be produced and manufactured outside the State of California. [3]

5. The facts above set forth are within my personal knowledge and, if called as a witness in this action, I would be competent to testify on the matters stated herein.

CLAUDE GRUEN
Claude Gruen

Subscribed and sworn to before me this 19th day of October, 1976.

RUBY P. JOHNSON
Notary Public in and for the City and County of San Francisco, State of California. [4]

OFFICIAL SEAL
RUBY P. JOHNSON
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission expires Mar. 13, 1979

Appendix I

Original Filed Nov 24 1976
Clerk U.S. Dist. Court
San Francisco

United States District Court
Northern District of California

No. C-74-2429 WWS

City of Rohnert Park, a municipal corporation,

Plaintiff,

v.

James T. Lynn, etc., et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This is an action by the City of Rohnert Park against the Secretary of the United States Department of Housing and Urban Development ("HUD"), the City of Santa Rosa, the Urban Renewal Agency of Santa Rosa and Ernest W. Hahn, Inc., a corporation, the developer. Rohnert Park is located about seven miles South of Santa Rosa on U.S. Highway 101. It complains that the defendants are engaged "in a scheme to develop a regional shopping center" in Santa Rosa, subsidized by federal funds. In this action, it seeks injunctive relief under Section 16 of the Clayton Act (15 U.S.C. Sec. 26) on the ground that the defendants' activities violate Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2).

Responsive to the Court's request for a statement of the grounds on which the antitrust claim is based, [1] plaintiff submitted the following statement which is quoted in full:

"Santa Rosa is located some seven (7) miles north of Rohnert Park. Rohnert Park has designated certain property within its boundaries as a site for a regional shopping center (Complaint, p. 3, lines 20-31).

There is currently in the Rohnert Park area a demand for approximately 627,000 square feet of retail space. There are developers who are ready, willing and able to supply this demand, but they are inhibited from so doing by the threat of a competing center planned by defendant Agency (Complaint, p. 4, lines 21-27).

Defendant Agency has entered into an agreement with defendant Developer, with the consent of defendant HUD, to develop a competing shopping center on a thirty-two (32) acre site in downtown Santa Rosa (Complaint, p. 5, lines 6-12; p. 6, lines 24-26).

There are presently approximately 748,000 square feet of general merchandise space available in Santa Rosa. Under the terms of said agreement defendant Developer will construct an additional 438,000 square feet of general merchandise space, thus increasing the total of such space in Santa Rosa to 1,186,000 square feet. Under the terms of said agreement defendant Developer will also build 322,000 square feet of other retail space in the proposed shopping center site. *'The excess retail space capacity to be so created will not be absorbed by the demand therefor until some time after the year 1980.'*[5] Hence this project will render non-competitive and impractical any project for a retail center in the proximity of Santa Rosa (Complaint, p. 9, lines 18-30).[6]

---

5. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

6. Plaintiff's allegations above summarized have not been 'pierced' by affidavits or other materials upon which motions for summary judgment may be grounded, and hence Plaintiff may *rest upon them* to establish that it has a valid claim for relief."

Plaintiff makes no claim that defendants either in conspiracy or otherwise engaged in any restrictive practices such as the fixing of prices, the imposition of exclusionary clauses or territorial restraints, or any other [2] type of conduct condemned as anticompetitive. Plaintiff's claim, pure and simple, is one of attempted preemption of future opportunities of others to compete by the planned construction of alleged excess retail store capacity.

The defendants have moved for summary judgment. We assume, for purposes of those motions, that the defendants' relevant activities are in interstate commerce.

In opposing these motions, plaintiff relies primarily on *In re Multidistrict Vehicle Air Pollution,* 538 F.2d 231 (9th Cir. 1976) and *United States v. Aluminum Co. of America,* 148 F.2d 416 (2nd Cir. 1945).

In *In re Multidistrict Vehicle Air Pollution,* the Ninth Circuit recognized that relief under Section 16 of the Clayton Act may be available in cases where Section 4 treble damages cannot be recovered because plaintiff can show no proximately caused injury to its business or property. The court also recognized that Section 16 may provide relief serving purposes other than restoring competition. Cf. *Bratcher v. Akron Area Board of Realtors,* 381 F.2d 723 (6th Cir. 1967) (reversing an order dismissing complaint for lack of jurisdiction). But the court made it clear that, regardless of what collateral purposes may be served, injunctive relief can only be granted against ongoing violations of the antitrust laws. (538 F.2d at 235-236)

The *Multidistrict* case, therefore, merely confirms the right to injunctive relief where plaintiff is able to establish an ongoing violation of the antitrust laws. It does not answer the question whether plaintiff's pleadings here raise a triable issue respecting the existence of such a violation.

In this regard, plaintiff places its reliance on *United States v. Aluminum Co. of America,* above. The language on which it relies, however, is taken out of context. [3] *Alcoa* does not make the creation of excess capacity a violation of the antitrust laws. On the contrary, the opinion clearly states that size alone is not an offense against the Sherman Act where it has been lawfully acquired. "The successful competitor, having been urged to compete, must not be turned upon when he wins." (148 F.2d at 430) Alcoa was condemned in that case not for possessing a monopoly, but for having abused it. (148 F.2d at 429-430) The decision discusses various acts of Alcoa by which it abused its monopoly in the aluminum ingot market, one of which was its effort to control that market by the continued expansion of its ingot production capacity to prevent others from entering the market (this being the passage quoted in plaintiff's memorandum).

Aside from the fact that plaintiff has misconceived the significance of *Alcoa,* its reliance on that case must founder on the elementary proposition that defendants here, unlike in *Alcoa,* have no monopoly whatever. The most that can be said of them is that they are engaged in developing a regional shopping center. Whether that shopping center, if, as or when built, could then be found to be a monopoly is anybody's guess—and will be no more than that at the time of a trial on plaintiff's instant complaint for an injunction against its construction.

This case therefore simply does not qualify as a monopolization case. But even assuming plaintiff could overcome that obstacle and state an attempt to monopolize case, it would still have to establish a specific intent to monopolize. See, *Hanson v. Shell Oil Co.,* No. 74-1034 (9th Cir., Sept. 3, 1976, Slip. Op. p. 7); *Hiland Dairy, Inc. v. Kroger Company,* 402 F.2d 968 (8th Cir. 1968). Plaintiff offers nothing from which a trier of fact can find such [4] a specific intent. (See plaintiff's statement of its case quoted above.) Certainly the entirely lawful purpose to revitalize downtown Santa Rosa by the development of a regional shopping center that will deter a flight of population and business to the suburbs could not sustain such a finding.

There are in this case none of the charges of anticompetitive or predatory conduct which normally provide the foundation for a finding of specific intent. See *Dahl Inc. v. Roy Cooper Co.,* 448 F.2d 17 (9th Cir. 1971).[1] In fact all but one of the defendants are government agencies or officials and the conduct complained of consists substantially of the exercise of their lawful duties and authorities, relief against which would in any event be barred by *Parker v. Brown,* 317 U.S. 341, 351 (1943).

It thus appears that plaintiff's case boils down to nothing more than an attempt to enjoin the lawful construction of a shopping center which, if built, might place at a competitive disadvantage any shopping center that might in the future be built within the limits of the plaintiff city.[2] That is not a case entitling plaintiff to relief under Section 16 which is limited to "ending ongoing violations." Inasmuch as plaintiff has made no showing from which a trier of fact could find ongoing violations of the antitrust laws, defendants'

---

1. Plaintiff's opposition memorandum refers to the filing of a lawsuit by Santa Rosa to enjoin plaintiff from granting applications to rezone property for commercial development, since terminated. The filing of such a lawsuit is absolutely privileged and not actionable. See, *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board,* (Ninth Circuit No. 73-2727, Sept. 17, 1976) (CCH T.C. para. 61,102).

2. In *Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936 (6th Cir. 1973), the court upheld the dismissal after trial of a similar antitrust claim, terming it "frivolous."

motions for summary judgment must be and they hereby are granted.

Dated: November 23, 1976.

WILLIAM W. SCHWARZER
United States District Judge [5]

Sent to:

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Appendix J

United States District Court
Northern District of California

No. C-74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

JUDGMENT

This action came on for hearing before the Court. Honorable William W. Schwarzer, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that summary judgment is granted, there being no genuine issue of material fact, and the action is hereby dismissed, each party to bear its own costs.

Dated at San Francisco, California this 6th day of December, 1976.

WILLIAM W. SCHWARZER
William W. Schwarzer
United States District Judge

Appendix K

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United States District Court
Northern District of California

CIVIL ACTION NO.
C 74-2429 WWS

City of Rohnert Park, a municipal corporation,
Plaintiff,

v.

James T. Lynn, etc., et al.,
Defendants.

NOTICE OF APPEAL

NOTICE is hereby given that CITY OF ROHNERT PARK, plaintiff above named, appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Summary Judgment filed in this action on November 24, 1976, and from the separate Judgment entered

pursuant to the Order Granting Summary Judgment on December 8, 1976.

Dated: December 15, 1976.

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Appendix L

Filed May 9 1979
Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

JAMES T. LYNN, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and KILKENNY, Circuit Judges and PFAELZER,* District Judge.

WRIGHT, Circuit Judge:

The City of Rohnert Park sought to enjoin the appellees, City of Santa Rosa, the Urban Renewal Agency of Santa Rosa (Agency), the Department of Housing and Urban Development (HUD), and Ernest W. Hahn, Inc. from developing a regional shopping center as part of an urban renewal project. Rohnert Park asserted that the shopping center project violated §§ 1 and 2 of the Sherman Act, 15

*Of the Central District of California.

U.S.C. §§ 1, 2 [1] (West Supp. 1978), as a restraint of trade and as the product of an alleged conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. The plaintiff also alleged that Santa Rosa sold the urban renewal land, with HUD approval, at less than fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. § 1460(c)(4)(1969).

Upon the appellees' motions for summary judgment, the district court found that Rohnert Park had failed to substantiate its antitrust allegations. Rohnert Park appeals.

FACTS

Rohnert Park and Santa Rosa, located within seven miles of one another, each wanted to develop a regional shopping center. Rohnert Park's master plan, adopted in 1966, designated areas within its boundaries as a commercial zone. The facilities proposed for the zone included a regional shopping center. The city owns two parcels within the commercial zone. Through the use of special assessment funds, it has improved the zone to render it suitable for development.

Santa Rosa's regional shopping center plan is part of an urban renewal and redevelopment project in the downtown area. The original urban renewal site, developed pursuant to the California Community Redevelopment Law, Cal. Health & Safety Code § 33000, *et seq.* (West 1973), was expanded after an earthquake created additional blighted land in need of redevelopment. [2]

Hahn was selected to develop the project. A tentative agreement entered into by the Agency and Hahn prescribed the terms of sale and conditions of development. In consideration for the site, Hahn agreed to pay $2 million, to construct and maintain parking facilities at its expense, and to make them available to the public.

Following the Agency's tentative agreement with Hahn, this suit was filed together with others, including a validating proceeding brought by Codding Enterprises[1] in state court. *See Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 81799, 84237, (Sonoma County Superior Court, unpublished opinion filed Dec. 7, 1976), *rev'd and remanded in part,* 1 Civil 41188 (Ct. App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup. Ct., June 28, 1978).[2] In the validating proceeding, the superior court held, *inter alia,* that there were no state antitrust violations and that the sale price set forth in the tentative agreement was fair and equitable and not in violation of 42 U.S.C. § 1460(c)(4). That holding was not disturbed on review by the state court of appeals.

THE ANTITRUST VIOLATIONS

In this suit, Rohnert Park alleges that the appellees engaged "in a scheme to develop a regional shopping center" in violation of federal antitrust laws.[3] The district

1. Codding Enterprises, a developer based in Rohnert Park, owns shopping centers in the area. It also owns much of the land in Rohnert Park which was to be part of the proposed Rohnert Park shopping center.

2. Other related actions include an earlier suit by Codding Enterprises, *Codding Enterprises v. Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 (Ct. App., unpublished opinion filed Oct. 23, 1975), and cross suits by Hahn and Codding Enterprises against one another for antitrust violations, *Ernest W. Hahn, Inc. v. Codding,* 423 F. Supp. 913 (N.D. Cal. 1976).

3. The federal antitrust laws require that the alleged violations have some nexus with interstate commerce in order for jurisdiction, finding a sufficient nexus with interstate commerce. Its position is supported by *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738 (1976). We assume, without deciding, that, if Rohnert Park could establish that antitrust violations occurred, the effects on interstate commerce would be sufficient to confer jurisdiction.

court granted summary judgment for the appellees on the ground that the plaintiff failed to show material facts from which a trier of fact could find ongoing violations of the antitrust laws. [3]

We need not reach the question whether summary judgment was appropriate on that ground. We conclude, instead, that the district court should have dismissed the action because Rohnert Park lacked standing.

Rohnert Park did not seek damages for the alleged antitrust violations. It sought only injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (West Supp. 1978). That section provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anttirust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, ...

In *State of Hawaii v. Standard Oil Company of California,* 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd,* 405 U.S. 251 (1972), we noted that the standing requirements under § 16 of the Clayton Act are broader than those under § 4 of the Act, which provides for recovery of treble damages only by a party injured in his business or property by reason of an antitrust violation. 15 U.S.C. § 15 (1973).

To have standing under § 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *Buckley Towers Condominimum, Inc. v. Buchwald,* 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977); *In Re Multidistrict Vehicle Air Pollution M.D.L.*

No. 31, 481 F.2d 122, 130 (9th Cir.) *cert. denied*, 414 U.S. 1045 (1973).[4] [4]

Rohnert Park alleges that if a regional shopping center is constructed as part of the Santa Rosa urban renewal project, it will discourage the development of a similar center in Rohnert Park. Relying upon *In Re Multidistrict*, 481 F.2d at 130-31, it argues that this threatens injury to interests cognizable in equity, for which it is entitled to § 16 relief.

In *In Re Multidistrict* we discussed two types of interests which can confer § 16 standing upon a state: the interests of citizens asserted by the state as *parens patriae* and the state's own proprietary interests. We found that plaintiff states had standing as *parens patriae* to seek equitable relief under § 16 in a suit alleging a conspiracy by the automobile industry to suppress antipollution technology.

Rohnert Park essentially asserts standing here as *parens patriae* on behalf of its property owners, taxpayers, and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park. Its argument fails because "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*, . . ." *In Re Multidistrict*, 481 F.2d at 131.

Political subdivisions may, however, "sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." *Id.* Rohnert Park asserts two such proprietary interests. First, it con-

---

4. One court concluded:
[i]t is apparent from the language of § 16 that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976) (footnotes ommitted). [i]

tends that it acted in a proprietary capacity in raising and disbursing the special assessment funds used to improve the commercial zone. It cites no authority supporting the contention that this is a sufficient proprietary [5] interest, and we decline to so hold.

Second, Rohnert Park argues that as the owner of property within the commercial zone, it possesses the requisite proprietary interests. That property, however, is designated as a library site and as such is not directly affected by the location of the regional shopping center.

Because it cannot assert the interests of its citizens, and has no proprietary interest of its own to vindicate, Rohnert Park fails to show an interest cognizable in equity, the first requirement for standing under § 16. Even if it could establish such an interest, it fails to meet the second requirement for § 16 standing; it has shown neither threat nor harm proximately resulting from a violation of the antitrust laws.

Although antitrust violations were not involved in *Warth v. Seldin*, 422 U.S. 490 (1975), that case presents an analogous situation. The question there was whether citizens of one town had standing to complain of the tax and revenue consequences and violations of third party rights caused by the zoning practices of a neighboring town which tended to discourage the development of low income and minority residences. The Court stated that

> [p]etitioners here . . . rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

Warth v. Seldin, 422 U.S. at 507.

Given the trade area, as Rohnert Park defined it, and the limited demand for new retail shopping center space in the area, any competition, whether or not it violates the anti-

trust laws, might have similar adverse effects on the [6] city's commercial development. Furthermore, Rohnert Park has not made a sufficient showing that, absent the alleged antitrust violations by appellants, its commercial area would have been selected as a site for shopping center development. As in *Warth,* the question whether these appellants would have benefited but for appellees' actions is entirely speculative. They have not demonstrated potential injury which confers standing to sue under § 16.

THE HOUSING ACT VIOLATION

As a separate claim apart from the antitrust allegations, Rohnert Park asserts that appellees HUD and the Agency violated 42 U.S.C. § 1460(c)(4) and HUD regulations by selling the shopping center land to Hahn at less than fair market value.[5]

The district court did not address this issue, but it was decided adversely to Rohnert Park's position in the state validating proceeding. *Codding Enterprises v. Urban Renewal Agency of Santa Rosa,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion, filed Dec. 7, 1976), *rev'd and remanded in part on other grounds,* 1 Civil 41188 (Ct. App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup. Ct., June 28, 1978).

The state court reached the following conclusions of law:

> 3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record. [7]

5. We need not reach the question whether Rohnert Park has standing to bring this suit under the Housing Act since we hold that it is collaterally estopped from relitigating the question of price.

> 4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the revelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

According to California Health & Safety Code § 33503 (West 1973), the determination in the validating proceeding precludes relitigation of the same issue. Section 33503 provides in pertinent part:

> The judgment [in a validating proceeding], if no appeal is taken, or if taken and the judgment is affirmed shall be forever binding and conclusive as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other parties and if the judgment determines that . . . the redevelopment plan is valid and effective. . . . the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issues as to which the judgment is binding and conclusive.

Under this provision, even though Rohnert Park was not a party to the validating proceeding, it would be barred from relitigating the fairness of the site sale price in state court. *See City of Ontario v. Superior Court,* 2 Cal.3d 335, 341, 466 P.2d 693 (1970) (interested party must bring validating proceeding within time and manner specified by Cal. Civ. Pro. § 860 (West Supp. 1978) or be forever barred from contesting the validity of agency action in a court of law).

Rohnert Park argues that the state validating proceeding does not bar adjudication of this issue in federal court. However, a recent Supreme Court decision establishes that state court judgments may have a collateral [8] estoppel effect upon litigation of specific issues in federal court.

In *Montana v. United States,* 47 U.S.L.W. 4190 (Feb. 20. 1979), the contractor on a federal project in Montana sued in state court, challenging the constitutionality of a state gross receipts tax imposed upon contractors working on federal, but not private, projects. The government sued in federal district court in Montana on substantially the same constitutional issues. The Montana Supreme Court decided the issues adversely to the contractor.

Although the government had not been a party to the action in state court, the United States Supreme Court held that the state court decision precluded the government's action in district court. The Court explained that the government was collaterally estopped from relitigating the issues because it had financed and controlled the state litigation. It stated: "although not a party, the United States plaintiff had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." 47 U.S.L.W. at 4192 (citing *Drummond v. United States,* 324 U.S. 316, 318 (1945)).

Here, although there is no evidence that Rohnert Park directed Codding Enterprises' suit in state court,[6] it had ample notice of that suit and an opportunity to participate. Codding Enterprises had no interests contrary to those asserted by Rohnert Park. In fact, Rohnert Park brought

6. Appellees allege, however, that Codding Enterprises contributed to the attorneys' fees fund for this suit.

this suit expressly on behalf of property owners such as Codding Enterprises.[7]

Section 33503 evidences a strong state interest in settling, in one forum, all questions regarding the validity of redevelopment plans. Rohnert Park offers no persuasive reason why we should disregard this provision [9] and reopen the question adjudicated in the earlier action. Consequently, we give effect to § 33503 and hold that resolution of the fair price issue in the validating proceeding bars parties who had notice and the opportunity to participate in the state proceeding from relitigating that issue in federal district court.

We remand to the district court for dismissal in accordance with this opinion. [10]

7. The validating proceeding in state court may be analogized to a class action suit, with Rohnert Park in the position of an unnamed class member who did not participate in the suit. In *Gart v. Cole,* 263 F.2d 244 (2d Cir.), *cert. denied,* 259 U.S. 978 (1959), the plaintiffs, unnamed members of the class of plaintiffs represented in an earlier state court action, sought to attack the validity or an urban renewal project in federal court on the same grounds employed in the previous state court action. The state court judgment was final. The court in *Gart* held that the second group of plaintiffs was barred from relitigating in federal court the issues decided in state court, even though those issues included constitutional questions.

The court found that there was no valid constitutional objection to holding the second plaintiffs bound by the earlier judgment since "[a]ll had ample notice of the suit; parties plaintiff there had no interests contrary to appellants in this action; and the same counsel prosecuted both suits." *Gart v. Cole,* 263 F.2d at 248. The court reasoned that

> [a]s members of the classes of plaintiffs represented in the . . . [earlier] case, appellants are barred by the judgment there from relitigating these issues with these defendants in the New York courts. . . . And the full-faith-and-credit clause requires a federal court to give equal effect to that judgment as a bar to relitigation of these issues. . . .

Gart v. Cole, 263 F.2d at 247-48 (citations omitted).

Although the prior state court proceeding in *Gart* was a class action suit, and the second group of plaintiffs were members of the class bound by the judgment, the court of appeals' reasoning is just as applicable here. [ii]

Appendix M(1)

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In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park,
Plaintiff-Appellant,

v.

James T. Lynn, Secretary, et al.,
Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

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In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park,
Plaintiff-Appellant,

v.

James T. Lynn, Secretary, et al.,
Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35 FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

On May 9, 1979, the Opinion of the Court in the above-captioned case was filed. This Court states therein (p. 10, Slip Opinion): "We remand to the District Court for dismissal in accordance with this opinion." Plaintiff Appellant CITY OF ROHNERT PARK respectfully petitions this Court for a rehearing of its Opinion and order of remand for all the reasons hereinafter set forth. Plaintiff-Appellant also suggests that a hearing in banc may be appropriate to secure or maintain uniformity of the decisions of this Court. City of Rohnert Park respectfully submits that the Opinion of this Court is inconsistent with decisions of the Ninth Circuit in *City of* [1] *Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975), *State of Washington v. Automobile Mfgrs. Assn.* (C.A. 9) 538 F.2d 231 (1976) and *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

I

THE POINTS OF LAW AND FACT WHICH THIS COURT HAS OVERLOOKED OR MISAPPREHENDED

A. By its Opinion of May 9, 1979, this Court has introduced a wholly novel and, indeed, revolutionary concept of law; namely, that a state court *in rem* proceeding filed *after* this action and one in which Appellant City of Rohnert Park and Appellee *Secretary of Housing and Urban Development* were not parties, ousts the United States District Court of the "original (and exclusive) jurisdiction" entrusted to it by Congress. See 28 U.S.C. 1331 (cases arising under the laws of the United States) and 28 U.S.C. 1337 (cases arising under the federal antitrust laws). Appellant brought its action under the National Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.), 15 U.S.C. §§ 1, 2, 26 and the Administrative Procedure Act, 5 U.S.C. 701 et seq. (R. 001), naming therein as a principal defendant the Secretary of Housing and Urban Development. Its "Complaint For Declaratory and Injunctive Relief" (hereinafter Complaint) was filed in the United States District Court, the *only* court with "original (and exclusive) jurisdiction" of the claims for relief set forth therein including those asserted against the Secretary of Housing and Urban Development, on November 19, 1974 (R. 001) *prior* to any [2] state court validation proceeding purportedly brought under Sections 33501-33502, California Health & Safety Code. The first of the two validation proceedings (No. 79762) was filed on December 27, 1974, and the First Amended Complaint therein was filed on August 19, 1975 (R. 247). The second validation action (No. 84237) was filed on December 3, 1975 (R. 279). See also Affidavit of Richard E. Brandt In Support of Motion For Summary Judgment and Motion to Dismiss (R. 242-246) stating these

were the two validation actions filed and those to which this Court adverted. Consequently, Rohnert Park was not "relitigating the question of (land disposition) price" (See Fn. 5, Slip Opinion), since it sought relief in the United States District Court under the Administrative Procedure Act (5 U.S.C. 701 et seq.), long before any state court purported to determine "fair value" under 42 U.S.C. 1460(c)(4). "*Fair value*" for the land disposition price in a federally assisted urban renewal project *must be determined by Appellee HUD*. See 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. It cannot be determined by a state court.

In fact, the Codding Enterprises Inc. validation actions are not yet final in that no final judgment can be entered by the Superior Court for Sonoma County. The reason is set forth at pages 7 and 8 of the unpublished opinion of the Court of Appeal (1 Civil 41188). This opinion is attached to a request for Judicial Notice supposedly filed with this Court by Appellees Urban Renewal Agency of the City of Santa Rosa and [3] City of Santa Rosa (hereinafter Santa Rosa Appellees) on November 21, 1978. In its opinion, the Court of Appeal, First Appellate District, found the environmental impact report (EIR) required by state law to be insufficient, citing *Toponga Ass'n for a Scenic Community v. County of Los Angeles* (1974), 11 C.3d 506, 515. Accordingly, it reversed the Superior Court with directions that the issue of the EIR's sufficiency ". . . be remanded by the trial court to those two bodies (the Urban Renewal Agency and Santa Rosa City Council) for reconsideration of their findings approving the E.I.R." No final judgment in the validation action can be filed until there is a legally sufficient EIR, since one is required *before* the proposed Santa Rosa regional shopping center can be built at all. See

California Environmental Quality Act (CEQA), California Public Resources Code, Sections 21000 et seq. and *No Oil Inc. v. City of Los Angeles* (1974) 13 C.3d 68. There the Supreme Court of California expressly held that: ". . . environmental issues be considered and resolved (in an EIR) before a project is approved." 13 C.3d at page 75. Since the challenge by Codding Enterprises to the sufficiency of the legally required EIR has not yet been finally determined by the state courts, the validation cases relied upon by this Court are not conclusive for any purpose in this action. In fact, the four cases to which this court referred, Nos. "79465, 79762, 81799 and 84237," by "Order" of the Superior Court filed on April 11, 1979, have been ". . . reset for trial setting conference calendar on June 20, 1979. . . ." Appellant requests this Court to take [4] judicial notice of the language quoted from said "Order." Rule 201, Federal Rules of Evidence.

From this, it follows that this Court overlooked or misapprehended the fundamental legal underpinning for its rationale (p. 9, Slip Opinion) that: "Section 33503 evidences a strong state interest in settling, in one forum, all questions regarding the validity of redevelopment plans." To put it another way, a validation proceeding cannot validate the failure to prepare and approve a legally sufficient EIR covering the project contemplated in the redevelopment plan. Entirely aside from the fact that Appellant never challenged the Santa Rosa Appellees' redevelopment plan, "all questions" concerning it have not yet been finally settled in any state court.

To support its decision, this Court relies on *Montana v. United States,* 47 U.S.L.W. 4190 (Feb. 22, 1979). There, the Supreme Court stated, at 4192: "Under collateral estoppel, once an issue is actually and necessarily determined by a

court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action *involving a party to the prior litigation.*" (Citation omitted and emphasis added.) Rohnert Park was not a party "to the prior litigation," so there can be no collateral estoppel as to it. Hence, the doctrine of *Montana v. United States,* supra, is not applicable herein. This Court, conceding, as it did, ". . . that Rohnert Park (did not) direct(ed) Codding Enterprises' suit in state court, . . .", this Court could only have used collateral estoppel on [5] the *suspicion* that it might have directed and controlled the state court suit. Clearly, in our system of jurisprudence, cases cannot be decided on the basis of suspicion.

Entirely aside from the fact that a state court has no jurisdiction to decide a federal question case, *United States v. Silliman* (D.C. N.J.) 65 F.Supp. 665, 669 (1946), and is thus not "a court of competent jurisdiction," the issue has not, as Appellant has shown, been "actually and necessarily determined." Moreover, Sections 33501-33503, California Health & Safety Code, do not expressly or by necessary implication permit state court validation of "fair value" under 42 U.S.C. 1460(c)(4). Congress expressly entrusted this determination to Appellee HUD, an agency of the United States.

At this point, Appellant City of Rohnert Park directs the attention of this Court to its claim for relief against Defendant-Appellee Secretary of HUD under the Administrative Procedure Act, 5 U.S.C. 702 and 704 (R. 002, 007 and 016) for its failure to comply with 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. Appellant has asked for affirmative relief against the Secretary of HUD, namely, to set aside the illegal approval of the land disposition price as "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law." See 5 U.S.C. 706(2)(A). Consequently, the "Conclusions of Law" relied upon by this Court as the basis for its collateral estoppel rationale are really quite irrelevant, since they deal *only* with what the Santa Rosa Urban Renewal Agency did [6] as disclosed in the validation proceeding, *not* what the Secretary of HUD did here, and did in a manner "not in accordance with the law", as shown by the record. In fact, the record in this case shows without conflict or contradiction that the Secretary of HUD violated 42 U.S.C. 1460(c)(4) and the regulations promulgated thereunder. The facts showing the Secretary's wrongful conduct are summarized at pages 16 to 21 of Appellant's Reply Brief, and these facts are undisputed.

There is no finding of fact or conclusion of law in the state court proceedings that the Secretary complied with the provisions of 42 U.S.C. 1460(c)(4) or the regulations thereunder (HUD's Urban Renewal Handbook Ch. 1, 7214.1, Rev 8/74). Nor could there be any such finding or conclusion in a state court proceeding, since the United States District Court has exclusive jurisdiction in a case where ". . . a complaint directly requests the affirmative relief provided by the statute (5 U.S.C. 706). Such an action is considered as 'arising under' that statute and is therefore exclusively within the jurisdiction of the federal courts." See "Exclusive Jurisdiction of the Federal Courts in Private Civil Actions," 70 Harvard L.R. 509, 510 (1957).

Furthermore, where a state court has no jurisdiction to determine a cause of action in a federal question case, its judgment is void. A void judgment will not extinguish the cause of action sued upon in the United States District Court, either by way of merger or bar. So also, it will not operate by way of collateral estoppel in a subsequent suit

based upon a [7] different cause of action. See Scott "Collateral Estoppel by Judgment," 56 Harvard L.R. 2, 18 (1942). See also *Armond Schmoll Inc. v. Federal Reserve Bank* (1941) 37 N.E.2nd 225, 227, 286 N.Y. 503 cert. den. 315 U.S. 818, 87 L.Ed. 1215. There the court, stating that the issue was ". . . whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court . . .," held that it could not be, because ". . . assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution." Cf. *Ex Parte Shockley* (D.C. Ohio) 17 F.2d 133, 137 (1926), and *815 Mission Corp. v. Superior Court* (1971) 22 C.A.3d 604, 625, where a state court held that the Secretary of Housing and Urban Development could not be made a party to proceedings in the state court without his consent. Other cases are in accord. See *Fieger v. Glenn Oaks Village* (1956) 132 N.E.2nd 492, 494-495 and *State of Alabama v. Rogers* (D.C. Ala.) 187 F.Supp. 848, 852 (1960). See also 21 C.J.S. Courts, Sec. 525 at page 796 and 2 Am.Jr.2d Administrative Law, Sec. 734 at page 634. The latter states that a state court has no jurisdiction to direct, compel or control the performance by a federal officer of a duty imposed upon him by a federal statute.

Finally, it is well settled that the jurisdiction of the federal court cannot be defeated or impaired by the institution, by one of the parties, of subsequent proceedings involv- [8] ing the same legal questions, in state court. *Prout v. Starr* (1903) 188 U.S. 537, 544-545, 47 L.Ed. 584, 588 and *Beck v. Jennes* (1849) 7 Howard 612, 624-625, 12 L.Ed. 841, 846. The Supreme Court has also held that the authority of the court first acquiring jurisdiction, the

parties being the same, must prevail in cases of concurrent jurisdiction. *Rickey Land & Cattle Company v. Miller & Lux* (1910) 218 U.S. 258, 262, 54 L.Ed. 1032, 1038. See also *Mach-Tronics Inc. v. Hon. Alfonso Zirpoli, Judge* (C.A. 9) 316 F.2d 820 (1963).

If the theory is not supported by the facts, they must be overlooked. This, Appellant respectfully submits, is what this Court has done.

B. Appellant Rohnert Park respectfully submits that this Court has overlooked the facts and the law of standing under Section 16, Clayton Act (15 U.S.C. 26). At the very outset, there is undisputed evidence that Rohnert Park owned, not *one* but *two* parcels of real property within the "regional commercial" area, both zoned or available for commercial uses. The second parcel is approximately 2.5 acres. See pages 35-43, Vol. I, Deposition of Peter Callinan and Exhibit B thereto, as well as the Brust Affidavit (R. 1018, 1021). One of them was a "proposed" library site, and there is nothing in this record showing whether the proposal was approved or carried out.

On these undisputed facts, this Court first states that Appellant ". . . cites no authority supporting the contention that this is a sufficient proprietary interest, and we decline [9] to so hold." (Slip Opinion, pp. 5-6). However, a ukase or fiat of this kind is not a substitute for a reasoned opinion for the guidance of the public and the litigants immediately affected.

Also, on the issue of standing, this Court, on an appeal from summary judgment, makes an unwarranted finding of fact which is not supported by any evidence in the record. Its unsupported finding is to the effect that the property owned by Rohnert Park is ". . . not *directly* affected by the location of the regional shopping center." (Slip

Opinion, p. 6, and emphasis added.) Regardless of the validity of this finding, what difference does it make if the property is directly or indirectly affected, so long as it is "affected?" The point is that the commercially zoned property is within the "target area" of the conspiracy and faces ". . . threatened loss or damage . . .." See 15 U.S.C. 26. Furthermore, no such ephemeral distinction was made in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973), where the court states at page 131 that cities ". . . might sue to vindicate such of their own properietary interests as might be congruent with the interests of their inhabitants." (Emphasis added.) The underscored word means "in harmony," or "consistent." Webster's New Collegiate Dictionary (1959, G & C. Merriam Co.). See also the unqualified statement by the Ratcliff Re-Use Appraisal (he was retained by the Santa Rosa Appellees) that the proposed regional shopping center in Santa Rosa would "kill off any possibility of a major development in Rohnert Park . . .." Ratcliff Re-Use [10] Appraisal, p. 24, Exhibit 30 to Deposition of James K. Burns. Moreover, in July, 1975, Appellee HUD *knew* that a regional shopping center with 700,000 square feet of GLA should be able to absorb most of the needed growth of commercial space in the Santa Rosa Trade Area until about 1990. See Daugherty Deposition, Exhibit 1 at pp. 114-115 (HUD's Final Environmental Impact Statement, FEIS). This would and did threaten Rohnert Park and its specially assessed property owners with the economic loss or damage arising from the inability to compete with a federally subsidized shopping center in Santa Rosa.

In its Slip Opinion, page 7, this Court stated that ". . . Rohnert Park has not made a sufficient showing that absent the alleged antitrust violations by appellants (should be

Appellees), its commercial area would have been selected as a site for shopping center development. . . .." "Selected" by whom is not made clear by this Court. However, in its Complaint, (R. 004), Rohnert Park made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56, F.R.C.P. This Court, [11] therefore, cannot, on an appeal from a summary judgment, make a finding of fact contrary to these allegations.

Furthermore, it is clear from an earlier decision of this Court that whether Rohnert Park's municipal interests arising out of its adoption of a master plan which includes a regional shopping center, are non-economic or unquantifiable is immaterial. *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975). There, the court held that the City of Davis had standing to sue the challenged federal action (a freeway interchange) which, it was alleged, would cause it "injury in fact, economic or otherwise." Here, a general or master plan has an economic impact on the area designated by Rohnert Park for inclusions therein of a regional shopping center. See *O'Loane v. O'Rourke* (1965) 231 C.A. 2d 774, 783.

On page 5, Slip Opinion, this Court stated that Rohnert Park ". . . cites no authority supporting the contention that this (disbursing funds raised by special tax assessment for improvements in anticipation of commercial development) is a sufficient proprietary interest . . ." to support standing to bring this equitable suit for injunctive relief. Appellant does not understand this reasoning, since the Court itself cited no authority for the proposition that such a showing was insufficient to support standing to sue for equitable relief. Such a suit would render unnecessary a multiplicity of such actions by all seventeen property owners. Brust Affidavit (R. 1018). On the contrary, Appellant cited *City of Seattle v. Stirrat* (1909) [12] 55 Wash. 560, 104 Pac. 834, 836-837 (pp. 7-8, Opening Brief) and four other cases. In *City of Seattle,* the Supreme Court of Washington held that the power of a city to grade streets or lay sewers or water pipes at the expense of abutting property owners (precisely what Rohnert Park did) represents action by the city in its proprietary capacity. In so doing, it becomes a trustee, agent and representative of its specially assessed property owners, and as custodian and guardian of the collective rights of its inhabitants, has standing to bring this action for equitable relief. Rohnert Park expressly disclaimed that it brought this action as *parens patriae.* It was brought to vindicate such of its properietary interests as were and still are, congruent with those of its inhabitants in general, and more particularly, those of the property owners specially assessed to finance improvements built in anticipation of a regional shopping center in Rohnert Park. They are clearly threatened with ". . . loss or damage . . .," namely, loss of their investment. The proposed construction of the Santa Rosa regional shopping center is and continues to

be the proximate cause of the ". . . threatened loss or damage . . ." to the specially assessed property owners in Rohnert Park and the City of Rohnert Park itself.[1] [13] The concept of "proximate cause" is less constrained under Section 16 cases than those arising under Section 4 for treble damages. See *Mid-West Paper Products Co. v. Continental Group, Inc.* (C.A. 3) ..... F.2d ....., 1979—1 Trade Cases 77070. There, the Court, in finding standing to sue under Section 16, stated on pp. 77084-77085:

> "In contradistinction to § 4, § 16 does not ground injunctive relief upon a showing that 'injury' has been already sustained, but instead makes it available 'against *threatened loss or damage.*' Furthermore, § 16 does not state that the threat must be to the plaintiff's 'business or property,' and courts accordingly have held that noncommercial interests are also protected. Most significantly, however, § 16 by its terms entitles a party to injunctive relief 'when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.' Mindful of these distinctions, courts have held that for purposes of § 16 the complainant 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur,' and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under § 16 has been framed in terms

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1. *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906) 203 U.S. 390, 51 L.Ed. 240, held that a municipality is a "person" within the meaning of Section 8 of the Sherman Act, the general definitional section, and therefore could maintain an antitrust action as a plaintiff. Rohnert Park, as a municipality, is similarly a "person" under Section 16, Clayton Act (15 U.S.C. 26). Cf. *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) —— U.S. ——, 46 L.W. 4265, 4267.

of a proximate cause standard that is 'less constrained' than that under § 4 and which might in fact be no more rigorous than the general rule of standing." (Citations omitted; emphasis in original.)

For all the foregoing reasons, Appellant petitions this Court for rehearing under Rule 40 and suggests the appropriateness of a hearing or rehearing in banc under Rule 35, Federal Rules of Appellate Procedure.

Dated: May 22, 1979.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON
William M. Brinton [14]

Appendix M(2)

FILED
JUL 24 1979
EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeal

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Wright has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix N

City of Rohnert Park, a municipal corporation,

Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California Corporation,

Defendants-Appellees

No. 77-1017

United States Court of Appeals,
Ninth Circuit

July 24, 1979

Plaintiff city brought action seeking to enjoin defendant city its urban renewal agency, the Department of Housing and Urban Development, and a developer from developing a regional shopping center as part of an urban renewal project, alleging that shopping center project violated federal antitrust laws and Housing Act of 1949. The United States District Court for the Northern District of California, William W. Schwarzer, J., entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) plaintiff did not have standing to sue under section of Clayton Act; (2) Housing Act of 1949 did not create private right of action to sue for violation of its provisions;

and (3) plaintiff lacked standing under Administrative Procedure Act to challenge either actions of Department of Housing and Urban Development or actions of defendant urban renewal agency.

Remanded for dismissal.

1. Commerce—62.10

Federal antitrust laws require that alleged violations have some nexus with interstate commerce in order for jurisdiction to exist. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

2. Monopolies—24(9)

Where city sought to enjoin defendants from developing regional shopping center as part of urban renewal project on ground that shopping center project violated federal antitrust laws in that construction of shopping center would discourage development of similar center in plaintiff city but where city's proprietary interest was speculative and city, as a political subdivision, could not sue as parens patriae, city failed to show interest cognizable in equity and failed to show either threat or harm proximately resulting from violation of antitrust laws and thus did not have standing to sue under section of Clayton Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

3. Monopolies—28(1.6)

To have standing under section of Clayton Act, a plaintiff must show a threatened loss or injury cognizable in equity proximately resulting from alleged antitrust violation. Clayton Act, § 16, 15 U.S.C.A. § 26.

4. Counties—208

Municipal Corporations—1016

Political subdivisions such as cities and counties whose power is derivative [2963] and not sovereign cannot sue as parens patriae, but political subdivisions may sue to vindicate such of their own proprietary interests as might be congruent with interests of their inhabitants.

5. Monopolies—24(9)

City's assertion that it acted in a proprietary capacity in raising and disbursing special assessment funds used to improve its commercial zone was not a sufficient proprietary interest to confer standing upon city under section of Clayton Act for purposes of suit to enjoin development of regional shopping center as part of an urban renewal project of other city. Clayton Act, § 16, 15 U.S.C.A. § 26.

6. Action—3

Housing Act of 1949 does not create private right of action to sue for violation of its provisions. Housing Act of 1949, § 110(c)(4) as amended 42 U.S.C.A. § 1460(c)(4).

7. Action—3

Four factors to be considered in determining whether private right of action should be implied are: whether plaintiff is one of the class for whose special benefit the statute was enacted, whether there is any indication of legislative intent to create federal right in favor of plaintiff, whether implication of such a remedy is consistent with legislative scheme, and whether cause of action is one traditionally relegated to state law.

8. Action—3

Where plaintiff city owned no land within proposed redevelopment project but sought to enjoin project on ground that defendant city sold urban renewal land, with approval of Department of Housing and Urban Development, and less than fair value in violation of Housing Act of 1949, where nothing in statute or regulations indicated legislative intent to allow private party to sue if land was sold at less than fair value, and where claim against defendant urban renewal agency was one relegated to state law, plaintiff city had no private right of action to sue under Housing Act of 1949. Housing Act of 1949, § 110(c)(4) as amended 42 U.S.C.A. § 1460(c)(4); West's Ann. Cal. Health & Safety Code, §§ 33433, 33503.

9. Municipal Corporation—1017

Section of Administrative Procedure Act providing that person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within meaning of relevant statute is entitled to judicial review thereon did not create right of action against city urban renewal agency, because agency was not an "authority of the government of the United States." 5 U.S.C.A. §§ 701(b)(1), 702; U.S.C.A. Const. art. 3, § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Civil Procedure—103

Where city brought action to enjoin defendants from developing regional shopping center as part of urban renewal project, where plaintiff city alleged that defendant city sold urban renewal land, with approval of Department

of Housing and Urban Development, at less than fair value in violation of Housing Act of 1949, where injury asserted by plaintiff city was potential, not actual, and where allegedly illegal agency action was failure to comply with regulations governing appraisal, relationship between injury asserted and alleged illegal agency action was so attenuated it failed to meet minimum article III requirements, and plaintiff city therefore lacked standing to sue under Administrative Procedure Act. 5 U.S.C.A. §§ 701(b)(1), 702; U.S.C.A.Const. art. 3, § 1 et seq.

Appeal from the United States District Court for the Northern District of California.

Before WRIGHT and KILKENNY, Circuit Judges, and PFAELZER,* District Judge.

EUGENE A. WRIGHT, Circuit Judge:

The court's opinion of May 9, 1979 has been withdrawn. The appellant's petition for rehearing and suggestion for rehearing en banc have been denied. The following replaces the court's earlier disposition.

The City of Rohnert Park sought to enjoin the appellees, City of Santa Rosa, the Urban Renewal Agency of Santa Rosa (Agency), the Department of Housing and Urban Development (HUD), and Ernest W. Hahn, Inc. from developing a regional shopping center as part of an urban renewal project. Rohnert Park asserted that the shopping center project violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (West Supp.1978), as a restraint of trade and as the product of an alleged conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. The plaintiff also alleged that Santa Rosa sold the urban renewal land, with HUD approval, at less than

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*Of the Central District of California.

fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. § 1460(c)(4) (1969).

Upon the appellees' motions for summary judgment, the district court found that Rohnert Park had failed to substantiate its antitrust allegations. Rohnert Park appeals.

FACTS

Rohnert Park and Santa Rosa, located within seven miles of one another, each wanted to develop a regional shopping center. Rohnert Park's master plan, adopted in 1966, designated areas within its boundaries as a commercial zone. The facilities proposed for the zone included a regional shopping center. The city owns two parcels within the commercial zone. Through the use of special assessment funds, it has improved the zone to render it suitable for development.

Santa Rosa's regional shopping center plan is part of an urban renewal and redevelopment project in the downtown area. The original urban renewal site, developed pursuant to the California Community Redevelopment Law, Cal. Health & Safety Code § 33000, *et seq.* (West 1973), was expanded after an earthquake created additional blighted land in need of redevelopment.

Hahn was selected to develop the project. A tentative agreement entered into by the Agency and Hahn prescribed the terms of sale and conditions of development. In consideration for the site, Hahn agreed to pay $2 million, to construct and maintain parking facilities at its expense, and to make them available to the public.

Following the Agency's tentative agreement with Hahn, this suit was filed [2965] together with others, including

a validating proceeding brought by Codding Enterprises[1] in state court. *See Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion filed Dec. 7, 1976), *rev'd and remanded in part,* 1 Civil 41188 (Ct.App., unpublished opinion filed Apr. 26, 1978), *hearing denied,* (Sup.Ct., June 28, 1978).[2] In the validating proceeding, the superior court held, *inter alia,* that there were no state antitrust violations and that the sale price set forth in the tentative agreement was fair and equitable and not in violation of 42 U.S.C. § 1460(c)(4). That holding was not disturbed on review by the state court of appeals.

THE ANTITRUST VIOLATIONS

[1] In this suit, Rohnert Park alleges that the appellees engaged "in a scheme to develop a regional shopping center" in violation of federal antitrust laws.[3] The district court granted summary judgment for the appellees on the

1. Codding Enterprises, a developer based in Rohnert Park, owns shopping centers in the area. It also owns much of the land in Rohnert Park which was to be part of the proposed Rohnert Park shopping center.

2. Other related actions include an earlier suit by Codding Enterprises, *Codding Enterprises v. Urban Renewal Agency of the City of Santa Rosa,* 1 Civil 36299 (Ct.App. unpublished opinion filed Oct. 23, 1975), and cross suits by Hahn and Codding Enterprises against one another for antitrust violations, *Ernest W. Hahn, Inc. v. Codding,* 423 F.Supp. 913 (N.D.Cal. 1976).

3. The federal antitrust laws require that the alleged violations have some nexus with interstate commerce in order for jurisdiction to exist. The district court assumed that it had jurisdiction, finding a sufficient nexus with interstate commerce. Its position is supported by *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). We assume, without deciding, that if Rohnert Park could establish that antitrust violations occurred, the effects on interstate commerce would be sufficient to confer jurisdiction.

ground that the plaintiff failed to show material facts from which a trier of fact could find ongoing violations of the antitrust laws.

[2] We need not reach the question whether summary judgment was appropriate on that ground. We conclude, instead, that the district court should have dismissed the action because Rohnert Park lacked standing.

Rohnert Park did not seek damages for the alleged antitrust violations. It sought only injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (West Supp.1978). That section provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, . . .

In *State of Hawaii v. Standard Oil Company of California,* 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), we noted that the standing requirements under § 16 of the Clayton Act are broader than those under § 4 of the Act, which provides for recovery of treble damages only by a party injured in his [2966] business or property by reason of an antitrust violation. 15 U.S.C. § 15 (1973).

[3] To have standing under § 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *Buckley Towers Condominium, Inc. v. Buchwald,* 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 571 (1977); *In Re Multidistrict Vehicle*

Air Pollution M. D. L. No. 31, 481 F.2d 122, 130 (9th Cir.), *cert. denied, Morgan v. Automobile Mfgrs. Ass'n,* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973).[4]

Rohnert Park alleges that if a regional shopping center is constructed as part of the Santa Rosa urban renewal project, it will discourage the development of a similar center in Rohnert Park. Relying upon *In Re Multidistrict,* 481 F.2d at 130-31, it argues that this threatens injury to interests cognizable in equity, for which it is entitled to § 16 relief.

In *In Re Multidistrict* we discussed two types of interests which can confer § 16 standing upon a state: the interests of citizens asserted by the state as *parens patriae* and the state's own proprietary interests. We found that plaintiff states had standing as *parens patriae* to seek equitable relief under § 16 in a suit alleging a conspiracy by the automobile industry to suppress antipollution technology.

[4] Rohnert Park essentially asserts standing here as *parens patriae* on behalf of its property owners, taxpayers, and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park. Its argument fails because "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae, . . .*" *In Re Multidistrict,* 481 F.2d at 131.

[5] Political subdivisions may, however, "sue to vindicate such of their own proprietary interests as might be

4. One court concluded:
> [i]t is apparent from the language of § 16 that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976) (footnotes omitted).

congruent with the interests of their inhabitants." *Id.* Rohnert Park asserts two such proprietary interests. First, it contends that it acted in a proprietary capacity in raising and disbursing the special assessment funds used to improve the commercial zone. It cites no authority supporting the contention that this is a sufficient proprietary interest under § 16, and we decline to so hold.[5] [2967]

Second, Rohnert Park argues that as the owner of property within the commercial zone, it possesses the requisite proprietary interests. Part of that property, however, is designated as a library site and the remainder had been set aside for expansion of a waste water facility. It is not clear from the record whether any of this land will be available for commercial use or whether its value will be affected by the location of the regional shopping center.

Because it cannot assert the interests of its citizens, and its own proprietary interest is speculative, Rohnert Park fails to show an interest cognizable in equity, the first requirement for standing under § 16. Even if it could establish such an interest, it fails to meet the second requirement

5. Appellant cites *City of Seattle v. Stirrat,* 55 Wash. 560, 104 P. 834, 836-37 (1909), for the proposition that the city had standing to sue as a trustee or agent for its specially assessed property owners and that it has a proprietary interest because it acted in its proprietary capacity in carrying out the improvements paid for by the special assessments.

In *Stirrat,* the city sued a contractor for money due in connection with work on local improvements. The contractor defended that it had paid the money to the city comptroller, who had absconded with it. The court held that the comptroller's act was ultra vires, but that the city, as trustee of the assessment fund, was estopped from denying the comptroller's authority.

No one asserts that Rohnert Park may not similarly sue contractors with whom it does business on behalf of its specially assessed residents. Here, however, it attempts to sue a local redevelopment agency, a federal agency, and a contractor with whom it and its residents have no contractual relationship. *Stirrat* provides no support.

for § 16 standing. It has shown neither threat nor harm proximately resulting from a violation of the antitrust laws.

Although antitrust violations were not involved in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that case presents an analgous situation. The question there was whether citizens of one town had standing to complain of the zoning practices of a neighboring town which tended to discourage the development of low income and minority residences. The Court stated that . . . .

> [p]etitioners here . . . rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

Warth v. Seldin, 422 U.S. at 507, 95 S.Ct. at 2209-10.

Given the trade area, as Rohnert Park defined it, and the limited demand for new retail shopping center space in the area, any competition, whether or not it violates the antitrust laws, might have similar adverse effects on the city's commercial development. Furthermore, Rohnert Park has not made a sufficient showing that, absent the alleged antitrust violations by appellees, its commercial area would have been selected as a site for shopping center development. As in *Warth,* the question whether these appellants would have benefited but for appellees' actions is entirely speculative. They have not demonstrated potential injury which confers standing to sue under § 16.

THE HOUSING ACT

Rohnert Park alleges that the Agency violated 42 U.S.C. § 1460(c)(4) (1976) and HUD regulations by selling the shopping center land to Hahn at less than fair market value,

and that HUD violated the statute and regulations by approving the sale. The city asserts standing under the Housing Act and the Administrative Procedure Act (APR).

We hold that the Housing Act does not create a private right of action to sue for violation of its provisions and that Rohnert Park lacks standing under the APA to challenge either HUD's or the Agency's actions.

Private Right of Action.

[6] The Housing Act defines an "urban renewal project" as [2968]

> undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight.
>
> * * * * *

42 U.S.C. § 1460(c) (1976). Those undertakings include "disposition of any property acquired in the urban renewal area . . . at its fair value for uses in accordance with the urban renewal plan . . .." *Id.* at § 1460(c)(4). HUD's Urban Renewal Handbook 7214.1, ch. 3 (Rev. 1974) outlines procedures for establishing "fair reuse value."

Because the Housing Act does not expressly provide that private persons may sue to enforce its terms, Rohnert Park may not sue under the act unless there is an implied right of action for such suits.

> [I]t is only if such a right of action exists that we need consider whether the [appellant] had standing to bring the action . . ..

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 456, 94 S.Ct. 690, 692, 38 L.Ed.2d 646 (1974).

[7] In *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Court set forth four factors to be considered in determining whether a private right of action should be implied. They are (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted" 422 U.S. at 78, 95 S.Ct. at 2088 (citations omitted); (2) whether there is any indication of legislative intent to create a federal right in favor of the plaintiff; (3) whether implication of such a remedy is consistent with the legislative scheme; and (4) whether the cause of action is one "traditionally relegated to state law." *Id.* (citations omitted). *Cf. Keaukaha-Panaewa Community v. Hawaiian Homes Com'n,* 588 F.2d 1216, 1222 (9th Cir. 1978) *petition for cert. filed,* 47 U.S.L.W. 3684 (Apr. 17, 1979).

The Sixth Circuit Court of Appeals has recently analyzed the Housing Act and the Urban Renewal Handbook under the four-part *Cort* test. *M. B. Guran Co., Inc. v. City of Akron,* 546 F.2d 201 (6th Cir. 1976). It concluded that regulations enacted pursuant to the statute did not create an implied private right of action for a disappointed contractor to challenge a local agency's failure to comply with competitive bidding guidelines.[6]

In applying the test, the court first noted that the central purpose of the Housing Act is "'the elimination of substandard and other inadequate housing through the clear-

6. In *Cedar-Riverside Associates, Inc. v. United States,* 459 F.Supp. 1290, (D.Minn.1978), the district court held that there was no implied private right of action which would allow private developers to sue a local redevelopment agency, the city of Minneapolis, the Secretary of HUD, and others for violation of the Housing Act.

The court followed *M. B. Guran,* in reasoning that plaintiffs, who did not reside within the urban renewal project and were not parties to contracts with the Agency, were not among those for whose "especial benefit the statute was enacted." [2969]

ance of slums and blighted areas, . . .,'" quoting 42 U.S.C. § 1441. It concluded that "the class for 'whose *especial* benefit the statute was enacted' must be the persons who inhabit inadequate housing." 546 F.2d at 204.

It next found "no indication of legislative intent to create the remedy sought," either in the statutory language or in the Handbook provisions, and stated:

> insofar as the existence of a private cause of action would lead to numerous suits against the local authority, the construction of urban projects would be delayed and the underlying purposes of the legislative scheme would be thwarted. Cf. *Gibson & Perin Co. v. Cincinnati,* 480 F.2d 936, 942 (6th Cir.), cert. denied, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973).[7]

Id. at 205.

Finally, it found that challenges to the "alleged arbitrary action of a state government" were "traditionally relegated to state law." *Id.*

7. In *Gibson & Perin Co.,* plaintiff businesses who were not located within an urban renewal project sued the city and the local agency, alleging deficiencies in design of a parking garage within the project. They did not sue under the Housing Act, but instead

> charged the defendants with violation of their civil rights, conspiracy, fraud, violation of federal and state antitrust laws, and with everything else that they could think of including the charge of depriving them of due process of law and the equal protection of the laws.

480 F.2d at 939.

Although this was not a Housing Act case, the policy considerations addressed by the court are relevant here:

> In our case no review was provided by statute of acts of agencies and private developers of Urban Renewal projects. We think it was because review would frustrate implementation of Urban Renewal plans and would discourage cities and redevelopers who might not want to become embroiled in protracted litigation, particularly after they had expended their money to participate in the project.

Id. at 942. [2970]

[8] Much of the court's reasoning applies here. Given the purpose of the Housing Act, it is difficult to conclude that an adjacent city which owns no land within the redevelopment project is among the class for whose especial benefit the statute was enacted.

Although there is statutory language which requires that urban renewal land be sold at fair value, nothing in the statute or the regulations indicates legislative intent to allow private parties to sue if the land is sold at less than fair value. HUD must approve the appraisals when urban renewal property is sold. The regulatory scheme provides for HUD oversight, not private action, to enforce agency compliance with the fair price provisions. *Cf. Berry v. Housing and Home Finance Agency,* 340 F.2d 939, 940 (2d Cir. 1965); *Johnson v. Redevelopment Agency of the City of Oakland, Cal.,* 317 F.2d 872, 874 (9th Cir. 1963).

Here, as in *M. B. Guran,* the existence of a private cause of action would thwart the underlying purposes of the legislative scheme by encouraging litigation which would delay the construction of urban renewal projects.

Finally, Rohnert Park's claim against the Agency is one "relegated to state law." California provides for a validating proceeding in which interested parties may assert challenges to actions of urban renewal agencies. Cal. Health & Safety Code § 33501 (West 1973). The precise question of the validity of the Agency's determination of fair reuse value and its compliance with HUD regulations was decided adversely to Rohnert Park's position in the state validating proceedings prosecuted simultaneously with this action. *Codding Enterprises v. Urban Renewal Agency of Santa Rosa,* Nos. 79465, 79762, 81799, 84237 (Sonoma County Superior Court, unpublished opinion, filed Dec. 7, 1976), *rev'd and remanded in part on other grounds,* 1 Civil 41188 (Ct.

App., unpublished opinion filed Apr. 26, 1978) *hearing denied,* (Sup. Ct., June 28, 1978).[8]

All four *Cort* criteria militate against implying a cause of action to sue the Agency for violating the Housing Act. Although the fourth criterion does not support a similar conclusion as to HUD, we hold nevertheless that Rohnert Park has no private right of action to sue HUD under the

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8. The state court reached the following conclusions of law:

3. The Agency's finding that the Hahn Contract was fair and equitable for the land according to its value for reuse, and that the consideration from Hahn was not less than its fair value for uses in accordance with the redevelopment plan, is supported by substantial evidence contained in the record.

4. The evidence presented at trial was insufficient for the Court to find that the Agency violated 42 United States Code Section 1460(c)(4), the Urban Renewal Handbook Section 7214.1, Health and Safety Code Section 33433 or any other state or federal law with regard to the adequacy of the consideration from Hahn for the shopping center site, or the parts of said site in Phase II and Phase III. The Agency is required to sell property in the redevelopment project area for not less than its fair value for uses in accordance with the redevelopment plan.

According to California Health & Safety Code § 33503 (West 1973), the determination in the validating proceeding precludes relitigation of the same issue. Under this provision, even though Rohnert Park was not a party to the validating proceeding, it would be barred from relitigating the fairness of the site sale price in state court. *See City of Ontario v. Superior Court,* 2 Cal.3d 335, 341, 85 Cal.Rptr. 149, 466 P.2d 693 (1970) (interested party must bring validating proceeding within time and manner specified by Cal.Civ.Pro. § 860 (West Supp.1978) or be forever barred from contesting the validity of agency action in a court of law).

Although we do not rest our decision on this ground, we note that the Supreme Court recently decided that entities which finance and control state litigation may be collaterally estopped in federal court from relitigating issues decided in the state action, even though they were not parties in state court. *Montana v. United States,* —— U.S. ——, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Here, the *Montana* facts are reversed: Codding Enterprises was a party in state court and has financed this litigation by Rohnert Park through contributions to the city's Chamber of Commerce. Deposition of Peter Callinan, Record at 917-20. [2971]

act. It has an adequate remedy against HUD under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), if it can meet the standing requirements of that section.

The Administrative Procedure Act.

The Administrative Procedure Act provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (1976).

[9, 10] We note at the outset that this provision does not create a right of action against the Agency because it is not an "authority of the Government of the United States" 5 U.S.C. § 701(b)(1) (1976). *See also Gibson & Perin Co. v. City of Cincinnati,* 480 F.2d 936, 941 (6th Cir. 1973). HUD clearly is an "agency" within the statutory definition, therefore the relevant question is whether Rohnert Park has standing under § 702.

The city relies upon *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), in which plaintiffs asserted standing under § 702 to challenge a ruling by the Comptroller of the Currency, based upon their status as competitors of national banks. The case established that plaintiffs seeking standing under § 702 must meet the minimum constitutional requirements of Article III. "The first question," according to the Court, "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 397 U.S. at 152, 90 S.Ct. at 829.

A more recent case involving § 702 sheds more light upon the injury-in-fact requirement. In *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), the Court explained:

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing exercise of its power by a federal court would be gratutitous and thus inconsistent with the Art. III limitation.

426 U.S. at 38, 96 S.Ct. at 1924 (footnote omitted). It continued:

> [I]ndirectness of injury, while not necessarily fatal to standing, "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."

426 U.S. at 44-45, 96 S.Ct. at 1927, *quoting Warth v. Seldin,* 422 U.S. 490, 505, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The injury asserted by Rohnert Park is potential, not actual: reduction in value of its property and that of its residents, and reduction in future tax revenues because of the inhibiting effect of the Santa Rosa project upon its commercial development.

The allegedly illegal agency action is failure to comply with the regulations set forth in the Urban Renewal Handbook 7214.1, Ch. 3 (Rev. 1974). Those regulations provide that when urban renewal land with a fair reuse value in excess of $25,000 is sold, HUD must obtain and review two appraisals of the land. One must be by an independent appraiser, but the other may be by "a competent Agency staff appraiser." *Id.* at 9.

In affidavits submitted in support of its motion for summary judgment, HUD asserted that it obtained three appraisals between 1970 and 1972; that they were reviewed by David L. Lane, an independent appraiser, in 1973; that Lane did an updated appraisal in 1975 which established a value of $1,829,520 for the property; and that Leevern Johnson, a HUD Realty Specialist, reviewed all these appraisals and found them "in accordance with HUD requirements." Rohnert Park asks us to "hold unlawful and set aside"[9] the sale of the Agency property because Johnson and Lane failed to consider all factors that Rohnert Park deems relevant in determining the fair reuse value of the land.[10]

Although potential injury may be sufficient to confer standing, *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), the relationship between

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9. It cites 5 U.S.C. § 706, dealing with scope of review of agency action:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) . . .;
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

5 U.S.C. § 706(1)(A)(1976). [2972]

10. Although it does not do so clearly, Rohnert Park also seems to argue that it is "aggrieved . . . within the meaning of a relevant statute" because HUD and the Agency's actions were part of a conspiracy to violate the antitrust laws.

We have held that the city lacks standing under § 16 of the Clayton Act to raise its antitrust claims and it may not do so indirectly by means of the APA.

the injury here and the alleged illegal agency action is too attenuated to meet the minimum Article III requirement.

Assuming we were to grant the requested relief, we would have to remand to the district court for a determination of fair reuse value in accordance with the regulations.[11] Assuming that determination resulted in a higher fair reuse value, the sale to Hahn could be declared void. Presumably, Hahn and the Agency would then be free to negotiate a sale based on the higher fair reuse value.

Several additional links in the chain of speculation are necessary, however, before we arrive at the point where Rohnert Park would be able to reap the benefits of commercial development within its boundaries. We would have to assume:

> (1) that Hahn and the Agency would be unable to renegotiate a sale of the property;
>
> (2) that their failure to consummate a sale would halt the Santa Rosa project or somehow limit its scope;
>
> (3) that businesses now slated for the Santa Rosa shopping center would then choose to locate in Rohnert Park; and
>
> (4) that financing would be available to fund an appropriate commercial development in Rohnert Park.

Rohnert Park has failed to show that the prospective injury to its proprietary interest "is likely to be reduced by a favorable decision." The scenario that would avert the injury is too "conjectural" and "hypothetical." *See O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674

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11. Were we to remand for further factfinding on the fair price issue, the district court in its discretion could decide to remand to HUD for proceedings in accordance with its specific instructions.

(1974).[12] Accordingly, we hold that the city lacks standing to sue under the APA because it fails to meet the fundamental constitutional requirement of injury in fact.

We remand for dismissal in accordance with this opinion.

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12. In *O'Shea*, the Court stated:
[a]bstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden v. Zwickler*, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-565, 91 L.Ed. 754 (1947).

414 U.S. at 494, 94 S.Ct. at 675. [2973]

Appendix O(1)

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,

Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,

Defendants-Appellees.

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

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In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.[1]

PETITION FOR REHEARING UNDER RULE 40, AND SUGGESTION OF A HEARING IN BANC UNDER RULE 35, FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

On *May 9, 1979*, this Court filed its *first* typewritten opinion in this case. At the conclusion of this opinion this Court said, "We remand to the District Court for dismissal in accordance with this opinion" (p. 10).

On *May 22, 1979*, Appellant filed its Petition for rehearing, and for a hearing in banc under Rules 35 and 40 of Federal Rules of Appellate Procedure.

On July 24, 1979, this Court having *with good reason* changed its mind regarding the validity of some of the reasons on which it supported its judgment of dismissal

1. Originally, and until July 24, 1979, the action was captioned in the Records of this Court as *City of Rohnert Park, a municipal corporation, Plaintiff-Appellant v. James T. Lynn, as Secretary of the United States, Department of Housing and Urban Development, et al., Defendants-Appellees.* [1]

denied appellant's petition; withdrew its first opinion and wrote a second opinion with which it has replaced the first (Second Opinion, p. 1). In this opinion the Court again concluded by saying, "We remand for dismissal in accordance with this opinion" (Second Opinion, p. 14).

Pursuant to Rule 40 of said Rules of Appellate Procedure, Appellant hereby again petitions this Court for a rehearing of its appeal. Hereinafter Appellant sets forth the points of law and fact which in its opinion this Court has overlooked or misapprehended.

Pursuant to Rule 35 of said Rules, Appellant also petitions for and suggests the appropriateness of rehearing in banc to secure and maintain uniformity of its decisions. In this connection appellant submits this Court's decision herein on the issue of "standing" conflicts sharply with its decision in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

THE POINTS OF LAW AND FACT WHICH THIS COURT HAS OVERLOOKED OR MISAPPREHENDED

A. By its Second Opinion of July 24, 1979, this Court has deprived Appellant of its Constitutional right to procedural due [2] process (U.S. Constitution, Amendment V). This it has done by departing from the settled course of judicial proceedings as established by law (Rule 56 of Federal Rules of Civil Procedure). The Court departed from the settled course of judicial proceedings when it denied Appellant relief under the Administrative Procedure Act on the ground that the relationship between Appellant's injury and Hud's illegal action in consenting to a sale of land for a price below its fair reuse value is *too attenuated* "to meet the minimum Article III requirement" (Second Opinion, p. 13). The reasoning whereby the

Court arrived at this conclusion is set forth at pages 11 to 14 of its Second Opinion.

The illegality of the Court's action and the invalidity of its reasoning becomes apparent when one considers that the judgment in the Court below was entered pursuant to Appellees' motions for summary judgment and that during that proceeding *the reality of Appellant's injury was not questioned.* Moreover, the Appellees did not in that proceeding raise the issue whether the prospective injury to Appellant's proprietary interest would or would not be "reduced by a favorable decision." Had these issues and questions been raised by Appellees during the proceeding, Appellant would have been given *notice* thereof, a *hearing* and an opportunity to produce admissible evidence demonstrating that there was a genuine issue of material fact regarding the reality of its injury (Rule 56 of Federal Rules of Court Procedure). [3]

Here, this Court in the role of a protagonist has, without notice to Appellant, and without supporting admissible evidence, determined that Appellant's injury was too conjectural to merit relief.

To bolster its unsupported conclusion the Court argues that before it could arrive at the point where Appellant would be able to reap "the benefits of commercial development within its boundaries" it would have to make a number of assumptions including one to the effect "that financing would be available to fund an appropriate commercial development in Rohnert Park." However, no such assumption is necessary because Appellant in its Complaint (R. 004) made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. *There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."*[2]

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56(c), F.R.C.P. This Court, therefore, cannot, on appeal from summary judgment make a finding contrary to these allegations.[3]

In any event this Court has decided the issue of the reality of Appellant's injury against it without evidence, without notice and without a hearing. Accordingly, this Court has deprived Appellant of its constitutional right to due process [*Denton v. Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236, 239 (1977); *Atwater v. Roudebush* (D.C. Illinois) 452 F.Supp. 622, 626-627 (1976)]. This being so, the Court should grant a rehearing and rule that Appellant is entitled to seek relief under the terms of the Administrative Procedure Act (5 U.S.C. Sec. 702).

B. Appellant Rohnert Park respectfully submits that this Court has overlooked the facts and the law of standing under Section 16, Clayton Act (15 U.S.C. 26). At the very outset, there is undisputed evidence that Rohnert Park owned *two* parcels of real property within the "regional commercial" area, both zoned or available for commercial uses. See pages 35-43, Vol. I, Deposition of Peter Callinan and Exhibit B thereto, as well as the Brust Affidavit (R. 1018, 1021). One of them was a "proposed" library site, and there is nothing in this record showing whether the pro-

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2. All emphasis added to quoted material is supplied by us, unless otherwise indicated.

3. These matters were called to the attention of the Court at pp. 11-12 of our first petition for a rehearing. [4]

posal was approved or carried out. Moreover, the record shows without conflict that Appellant has in its *proprietary capacity* raised and disbursed the funds required to improve its commercial zone.

On these undisputed facts, this Court first states that Appellant ". . . cites no authority supporting the contention that this is a sufficient proprietary interest, and we decline [5] to so hold." (Second Opinion, pp. 5-6). However, a ukase or fiat of this kind is not a substitute for a reasoned opinion for the guidance of the public and the litigants immediately affected.

Pursuing further the matter of standing the Court argues that it is *not clear* from the record whether any Appellant land will be available for commercial use or "whether its value will be affected by the location of the regional shopping center." (Second Opinion, p. 6.) This is irrelevant.[4] The point is that all the commercially zoned property, including Appellant's, is within the "target area" of the conspiracy and faces ". . . threatened loss or damage. . . ." See 15 U.S.C. 26. Furthermore, no such ephemeral distinction was made in *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973), where the court states at page 131 that cities ". . . might sue to vindicate such of their own proprietary interests as might be *congruent* with the interests of their inhabitants." The underscored word means "in harmony," or "consistent." Webster's New Collegiate Dictionary (1959, G & C. Merriman Co.). See also the unqualified statement in Ratcliff Re-Use Appraisal (he was retained by the Santa Rosa Appellees) that the proposed regional

4. On motion for summary judgment the evidence always is construed in favor of the party opposing the motion and he *is given the benefit of all favorable inferences* that can be drawn from it. (Wright & Miller, Federal Procedure; Civil Sec. 2727, pp. 526-528). [6]

shopping center in Santa Rosa would "kill off any possibility of a major development in Rohnert Park. . . ." Ratcliff Re-Use Appraisal, p. 24, Exhibit 30 to Deposition of James K. Burns. Moreover, in July, 1975, Appellee HUD *knew* that a regional shopping center with 700,000 square feet of GLA should be able to absorb most of the needed growth of commercial space in the Santa Rosa Trade Area until about 1990. See Daugherty Deposition, Exhibit 1 at pp. 114-115 (HUD's Final Environmental Impact Statement, FEIS). This would and did threaten Rohnert Park and its specially assessed property owners with the economic loss or damage arising from the inability to compete with a federally subsidized shopping center in Santa Rosa.

In its Second Opinion, page 7, this Court states that ". . . Rohnert Park has not made a sufficient showing that absent the alleged antitrust violations by Appellees, its commercial area would have been selected as a site for shopping center development. . . ." "Selected" by whom is not made clear by this Court. However, in its Complaint, (R. 004), Rohnert Park made the following allegations:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of some forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from so doing by the threat of a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."[5]

These allegations were not probed by any evidence submitted by Appellees on their motion for summary judgment. Accordingly, they must be accepted as true and raise a genuine issue of material fact. Rule 56, F.R.C.P. This

5. This allegation is also discussed at page 4 of this Petition. [7]

Court, therefore, cannot, on an appeal from a summary judgment, make a finding of fact contrary to these allegations.

Furthermore, it is clear from an earlier decision of this Court that whether Rohnert Park's municipal interests arising out of its adoption of a master plan which includes a regional shopping center, are non-economic or unquantifiable is immaterial. *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975). There, the court held that the City of Davis had standing to sue the challenged federal action (a freeway interchange) which, it was alleged, would cause it "injury in fact, economic or otherwise." Here, a general or master plan has an economic impact on the area designated by Rohnert Park for inclusions therein of a regional shopping center. See *O'Loane v. O'Rourke* (1965) 231 C.A.2d 774, 783.

On pages 5 and 6 of its Second Opinion, this Court states that Rohnert Park ". . . cites no authority supporting the contention that this (disbursing funds raised by special tax assessment for improvements in anticipation of commercial development) is a sufficient proprietary interest . . ." to support standing to bring this equitable suit for injunctive relief. Appellant does not understand this reasoning, since the Court [8] itself cited no authority for the proposition that such a showing was insufficient to support standing to sue for equitable relief. Such a suit would render unnecessary a multiplicity of such actions by all seventeen property owners. Brust Affidavit (R. 1018). On the contrary, Appellant cited *City of Seattle v. Stirrat* (1909) 55 Wash. 560. 104 Pac. 834, 836-837 (pp. 7-8, Opening Brief) and four other cases. In *City of Seattle*, the Supreme Court of Washington held that the power of a city to grade streets or lay sewers or water pipes at the expense of abutting property owners (precisely what Rohnert Park did) represents action by the city in its proprietary capacity. In so doing, it becomes a trustee, agent and representative of its specially assessed property owners, and as custodian and guardian of the collective rights of its inhabitants, has standing to bring this action for equitable relief. Rohnert Park expressly disclaimed that it brought this action as *parens patriae*. It was brought to vindicate such of its proprietary interests as were and still are, congruent with those of its inhabitants in general, and more particularly those of the property owners specially assessed to finance improvements built in anticipation of a regional shopping center in Rohnert Park. They are clearly threatened with ". . . loss or damage . . . ," namely, loss of their investment. The proposed construction of the Santa Rosa regional shopping center is and continues to be the proximate cause of [9] the ". . . threatened loss or damage . . ." to the specially assessed property owners in Rohnert Park and the City of Rohnert Park itself.[6] The concept of "proximate cause" is less constrained under Section 16 cases than those arising under Section 4 for treble damages. See *Mid-West Paper Products Co. v. Continental Group, Inc.* (C.A. 3) ..... F.2d ....., 1979 - 1 Trade Cases 77070. There, the Court, in finding standing to sue under Section 16, stated on pp. 77084-77085:

> "In contradistinction to § 4, § 16 does not ground injunctive relief upon a showing that 'injury' has been already sustained, but instead makes it available

6. *Chattanooga Foundry & Pipe Works v. City of Atlanta* (1906) 203 U.S. 390, 51 L.Ed. 240, held that a municipality is a "person" within the meaning of Section 8 of the Sherman Act, the general definitional section, and therefore could maintain an antitrust action as a plaintiff. Rohnert Park, as a municipality, is similarly a "person" under Section 16, Clayton Act (15 U.S.C. 26). Cf. *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) ..... U.S. ....., 46 L.W. 4265, 4267. [10]

'against *threatened loss or damage.*' Furthermore, § 16 does not state that the threat must be to the plaintiff's business or property,' and courts accordingly have held that noncommercial interests are also protected. Most significantly, however, § 16 by its terms entitles a party to injunctive relief 'when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.' Mindful of these distinctions, courts have held that for purposes of § 16 the complainant 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur,' and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under § 16 has been framed in terms of a proximate cause standard that is 'less constrained' than that under § 4 and which might in fact be no more rigorous than the general rule of standing." (Citations omitted; emphasis in original.)

C. At pages 7-11 of its Second Opinion the Court considers the question whether Appellant or some similarly situated has an implied right of action against HUD in the event it violates the provisions of the Housing Act, and concludes that no such right exists. It reaches this conclusion on the basis that the Housing Act was not enacted *for the benefit of Appellant and its property owners* (Second Opinion, pp. 9-11). In testing the validity of this conclusion it should be borne in mind that we are not dealing here with urban *housing*, but with urban *commercial* development, and that Appellant's property owners are *private entrepreneurs,* who are not aided by governmental subsidies.

With this in mind we advert to the fact that it is HUD's statutory duty to "*encourage private enterprise* to serve

as large a part of the nation's total . . . urban development needs as it can and develop the fullest cooperation with *private enterprise* in achieving the objectives of the Department." (42 U.S.C. 3532(b).) Accordingly, it must be conceded that the Housing Act was enacted for the benefit of entrepreneurs such as Appellant's property owners. Moreover, in the context of this case, it is obvious that HUD's statutory objectives cannot be achieved if it is permitted to subsidize Appellee [11] Hahn while it competes unfairly with these property owners.

On the basis of the foregoing we submit that this Court in ruling that the Housing Act does not afford Appellant and its property owners a right of action, it has entirely overlooked and misapprehended the law and facts involved in this appeal.

For all the foregoing reasons, Appellant petitions this Court for a rehearing under Rule 40 and suggests the appropriateness of a hearing or rehearing in banc under Rule 35, Federal Rules of Appellate Procedure.

Dated: August 6, 1979.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By RICARDO J. HECHT [12]

Appendix O(2)

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing, Judge Wright has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix P(1)

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT OF CIVIL CONTEMPT UPON DEFENDANTS-APPELLEES PURSUANT TO RULE 27, FEDERAL RULES OF APPELLATE PROCEDURE

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Tel: (415) 397-4600
Attorneys for Plaintiff-Appellant

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT OF CIVIL CONTEMPT UPON DEFENDANTS-APPELLEES PURSUANT TO RULE 27, FEDERAL RULES OF APPELLATE PROCEDURE

Plaintiff-Appellant hereby respectfully moves this Honorable Court for a Judgment of Civil Contempt against Defendants-Appellees and as grounds therefor shows:

I By its complaint filed in the United States District Court Appellant sought to *enjoin* the Appellees from developing a regional shopping center as part of an urban renewal project. Appellant alleged that the shopping center project violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, as [1] a restraint of trade, and as the product of a conspiracy or attempt to monopolize retail merchandise space in the Santa Rosa trade area. Appellant also alleged that the Santa Rosa Appellees (City of Santa Rosa and Urban Renewal Agency) in furtherance of the

conspiracy, entered into a contract, with the approval of Appellee HUD, to sell the urban renewal land on which the shopping center was to be constructed to Appellee Hahn, a land developer, at less than its fair value in violation of the Housing and Development Act of 1965, 42 U.S.C. 1460(c)(4).

II On the basis of the allegations above summarized Appellant by its said complaint sought, *inter alia,* the following relief:

1. A declaration that the sale of the land to Appellee Hahn by the Santa Rosa Appellees at less than fair market value is illegal and in violation of 42 U.S.C. 1460(c)(4) (R. 013-014).[1]

2. A declaration that Appellee HUD is acting illegally and in excess of its authority in approving the agreement between the Santa Rosa Appellees and Appellee Hahn for the disposition of said land (R. 014).

3. A declaration that the agreement between the Santa Rosa Appellees and Appellee Hahn, if carried out, represents a combination in unreasonable restraint of interstate trade or commerce (R. 014).

4. A declaration that said agreement, if carried out, represents an attempt to monopolize, or conspiracy to monopolize interstate trade or commerce (R. 014).

5. A declaration that Appellant, its inhabitants, merchants, property owners and taxpayers are threatened with loss and damage that exceeds the sum of $1,207,000 (R. 014-015).

6. A declaration that Appellant is entitled to sue for and have injunctive relief against said threatened loss (R. 015).

---

1. This is a reference to the Record on Appeal. [2]

7. *A permanent injunction permanently restraining:*

(a) Appellee HUD from approving the land disposition agreement between the Santa Rosa Appellees and Appellee Hahn (R. 015);

(b) Santa Rosa Appellees from selling, transferring or otherwise disposing of all land acquired or to be acquired by them for sale, transfer or other disposition to Appellee Hahn for use by it in connection with or as part of said regional shopping center (R. 015).

(c) Appellee HUD from authorizing, approving or taking [3] any action whatsoever without first complying with the National Housing Act, 42 U.S.C. 1460(c)(4).

III Appellant does not seek damages for the violations of law alleged in its complaint. It seeks only declaratory and injunctive relief as above set forth.

IV After filing their respective answers to Appellant's complaint, Appellees each interposed separate motions for summary judgment.

V The admissible evidence adduced before the District Court on said motions establishes without conflict that the price at which the urban renewal land is to be sold under the terms of said contract is substantially less than its fair reuse value.

VI The admissible evidence adduced before the District Court on said motions establishes without conflict that Appellee HUD in approving and concurring in the price at which said land is to be sold violated all the rules promulgated by it for the determination of fair reuse value of urban renewal land.

VII The District Court granted said motions for summary judgment on the ground that Appellant had failed to establish that Appellees had violated the Sherman Act. The District Court did not pass on the issue whether Appellant was entitled to relief by reason of the sale of said urban [4] renewal land at less than fair reuse value. Following the granting of said motions for summary judgment, Appellant filed this appeal.

VIII Thereafter, the parties filed their briefs and on *December 4, 1978* the appeal was orally argued before this Court. Upon the conclusion of the argument the matter was submitted to the Court for decision.

IX Following the submission of the cause for decision, and on *May 9, 1979,* the Court filed its *first* opinion herein which was adverse to Appellant, and whereby the Court remanded the matter to the District Court for dismissal in accordance with the opinion. Thereafter, Appellant filed a timely petition for rehearing, and for a rehearing in banc. Later, this Court having denied Appellant's petition, withdrew its opinion of *May 9, 1979,* and replaced it with a *second* opinion filed on *July 24, 1979.* This opinion was also adverse to Appellant, and the Court thereby again remanded the cause to the District Court for dismissal. Subsequently, Appellant filed another timely petition for a rehearing and for a rehearing in banc. This Court has not as yet ruled on this petition.

X During the period *December, 1978,* to *July, 1979* and while this Court was devoting its time and resources [5] to arrive at a judgment in this cause the Appellees were engaged in a concerted and determined effort to "moot" it by placing the *res,* i.e., the urban renewal land in question, beyond the reach of the process of this Court [18 U.S.C. 401(3)], by transferring possession and title thereto to Appellee Hahn, thus enabling it to proceed with the construction of the projected shopping center thereon.

XI Insofar as Appellant and its counsel know, this Court has not been informed of this transfer of possession

and title, and Appellant and its counsel did not learn of it until on or about August 6, 1979.

XII On August 21, 1979, Appellant's counsel filed with Appellee HUD a request for production and disclosure of records under the Freedom of Information Act (5 U.S.C. 552). Pursuant to this request and on about September 4, 1979, Appellant received from Appellee HUD a number of copies of documents which disclose some of the details of said transfer of possession and title.

The earliest of these documents, is a letter dated *January 15, 1979,* from Appellee Urban Renewal Agency[2] to the acting Area manager of Appellee HUD. A true copy of said letter, marked Exhibit "A", is attached hereto and made a part hereof. The purpose of this letter was to request a waiver from HUD of the requirements of Section 106(E) of the Loan and Grant contract of June 2, 1962 entered into by and between Appellee Urban Renewal Agency and Appellee HUD. Section 106(E) provides:

> "(E) *Sales of Project Land to be for Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof."

This waiver is requested, as the letter explains, in order to permit Appellee Agency "to convey title to the project property" to Appellee Hahn "in advance of the Agency's actual receipt of the Developer's payment for the land" (Ex. "A", p. 1). This waiver, when granted, in effect permits Appellee Agency to sell the urban renewal land to Appellee Hahn on credit without any interest charge, and at a price which is substantially less than its fair reuse value.

2. Now known as "Housing and Development Agency." [6]

This letter also discloses that a part of the urban renewal land was sold to Appellee Hahn in *December, 1978,* and that Appellee Hahn has been at least since that date engaged in constructing a "store" on this land. This is explained in the letter in detail, as follows:

> "The Agency has entered into a contract, dated December 1, 1975, for sale of project land to Ernest W. Hahn, Inc., for development of a regional [7] shopping center to be located in Phases II and III of the project. *This contract and the sale price of the land were approved by HUD on November 7, 1975.* Under this contract and plans prepared by Hahn, Hahn will develop a 30-acre regional shopping center that will eventually include approximately 684,000 square feet of gross leasable space, three major department stores, a mall and parking facilities. *One of the major tenants of the shopping center, Sears, Roebuck & Company, is presently operating a retail department store in the project area in a cramped and obsolete structure. Under the terms of Hahn's agreements with Sears, Hahn will construct the new store for Sears first.* Because of the project delays caused by continued litigation, described below, *Hahn was required to enter the site of the future Sears store before escrow could be closed on this parcel for certain preliminary site work for the Sears store,* in order to meet its commitments to Sears. Under the severe time restraints imposed by those commitments, it was necessary for Hahn to use its own funds (not loan funds) *to purchase a portion of the Phase II land in December 1978, to enable the construction of the Sears store to continue,* even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract."[3] (Exhibit A, pp. 1-2.)

3. All emphasis added to quoted material is ours, unless otherwise indicated. [8]

The above quoted part of the letter establishes that title and possession of a part of the urban renewal land was transferred to Appellee Hahn as early as *December, 1978,* and that the consideration paid is substantially less than the fair reuse value of the land.

That the waiver sought by Appellee Agency is required in order to permit the "project to proceed" is explained in the letter as follows:

> "Lastly, the approach outlined will benefit HUD because quite simply, it will enable us to repay the loan from HUD. Under the Contract, the HUD loan will not begin to be repaid, in effect, until the project land is sold. The sequence of litigation and the succession of obstacles previously described has indicated that some form of special arrangement that differs from the conventional transactions contemplated by the terms of the Loan and Grant Contract may be necessary for the project to proceed. For these reasons, the Agency and Hahn have developed the arrangement outlined above as providing a practical solution of the difficulties encountered and we are requesting the necessary waiver at this time *to permit the project to proceed.*" (Exhibit A, pp. 4-5.)

The other documents furnished to Appellant by Appellee disclose that HUD's Area Office made a favorable recommendation on the request for the waiver to an Assistant Secretary of HUD and that on *July 31, 1979,* the desired waiver was granted by Appellee HUD. True copies of these documents, marked as Exhibits "B", "C", "D", "E", "F", "G", "H", "I", "J", "K" and "L" respectively, are attached hereto, and made a part hereof.

These documents also disclose that the grant of the waiver was the result of close and harmonious collaboration between Area Counsel for HUD and the attorneys of record herein for Santa Rosa Appellees. Area Counsel is

not an attorney of record for HUD in this litigation. There is nothing in these documents which indicates that the attorneys of record for Appellee HUD participated in or had any knowledge of the steps [9] taken to transfer title and possession of the urban renewal property to Appellee Hahn.

HUD's Area Counsel have refused to disclose to Appellant the document or documents in which they recommended to the Assistant Secretary of HUD that he act favorably on the request for the waiver.

On *July 31, 1979,* the Deputy Area Manager for HUD wrote a letter to Appellee Urban Renewal Agency in which was enclosed a "duplicate original" of the requested waiver. This letter reads in pertinent part as follows:

> "Enclosed you will find an executed duplicate original Waiver No. 3 by which the Government waives Section 106(E) of the subject loan and grant contract to the extent necessary to allow conveyance of certain project land prior to payment by the redeveloper, but only upon deposit into escrow of an irrevocable unconditional letter of credit in the full amount of the purchase price.
>
> "Please understand that the waiver is of no force and effect unless and until the letter of credit has been placed into escrow.
>
> *"We congratulate you on coming another step closer to both physical completion of the project* and financial settlement of the outstanding Project Temporary Loan." (Exhibit "K".)

The last paragraph of the Waiver enclosed with the above quoted letter states:

> "NOW THEREFORE, the United States of America, acting by and through the Secretary of the Department of Housing and Urban Development hereby waives Section 106(E) of the Contract to the

extent necessary [10] to allow the Local Public Agency *to convey title to the balance of the shopping center site to the Redeveloper upon deposit into escrow of an irrevocable unconditional letter of credit for $1,140,000 in lieu of cash representing the total purchase price* with instructions to the escrow holder to pay the entire sum over to the Local Public Agency upon demand no later than the opening of any portion of *the shopping center presently being constructed by the Redeveloper* in the Calif. R-45 Project Area."

Presumably pursuant to the terms of the waiver, the Bank of America issued an "Irrevocable Standby Letter of Credit," dated July 27, 1979, in the sum of $1,140,000. This letter of credit, which is addressed to Appellee Agency reads in part as follows:

"GENTLEMEN:
"We hereby establish our irrevocable letter of credit in your favor available by your drafts drawn at SIGHT on US* and accompanied by documents specified below.

"COVERING: SANTA ROSA MALL LAND PURCHASE REGARDING ESCROW NUMBER 116954 WITH TITLE INSURANCE AND TRUST COMPANY.

"NO OTHER DOCUMENT REQUIRED.

"*STATING THAT THE PERSON EXECUTING DRAFTS IS THE CURRENT EXECUTIVE DIRECTOR OF REDEVELOPMENT AGENCY OF THE CITY OF SANTA ROSA."

By the acts above described, the Appellees put the urban renewal property beyond their control as well as that of this Court. By joining in these acts Appellee HUD took

upon itself the right to decide in favor of the Santa Rosa Appellees and Appellee Hahn. This use of power is an [11] arrogation of this Court's responsibility. Appellees' aim in taking this action is to thwart any adverse decree which might ultimately be forthcoming on the appeal. This in effect is resistance to this Court's lawful writ, process, order, rule, decree or command. Accordingly, Appellees are guilty of civil contempt.

WHEREFORE, Appellant prays for relief as follows:

1. A judgment of civil contempt upon Defendants-Appellees;

2. Restoration of the *status quo* by issuing an order commanding Appellee Hahn, its agents, representatives, servants and employees forthwith to stop all further construction in the urban renewal land and commanding them forthwith to relinquish possession of said land;

3. Restoration of the *status quo* by an order commanding Appellees, their agents, representatives, servants and employees to take no further action to transfer title to the urban renewal land from Appellee Agency to Appellee Hahn.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON
Attorney for Appellant

Dated: September 27, 1979. [12]

EXHIBIT "A"

Department of Housing and
Urban Development
Jan 17 1979

Area Director's Office
San Francisco, California
January 15, 1979

Robert L. Cunningham
Acting Area Manager
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, California 94111

Reference: Santa Rosa Center Redevelopment Project
(Calif.R-45)—Request for Waiver

Dear Mr. Cunningham:

The purpose of this letter is to request a waiver by your office of the requirements of Section 106(E) and any other applicable provisions of the Loan and Grant Contract dated June 6, 1962, as amended, between the U.S. Department of Housing and Urban Development (HUD) and the Agency. This waiver is requested in order to permit the Redevelopment Agency to convey title to project property to the Developer in advance of the Agency's actual receipt of the Developer's payment for the land. The purchase price of the parcel will be held in escrow until certain recorded lis pendens have been lifted.

Since 1961, the Agency has been carrying out the Santa Rosa Center Project, a redevelopment project in downtown Santa Rosa. The project is in three phases, the first two phases of which are receiving federal financial assistance

under the HUD Loan and Grant Contract (the "Contract"). As you are aware, under the terms of the Contract the proceeds of the resale of land in the covered portion of the project area will be paid by the Agency to HUD.

The Agency has entered into a contract, dated December 1, 1975, for sale of project land to Ernest W. Hahn, Inc., for development of a regional shopping center to be located in Phases II and III of the project. This contract and the sale price of the land were approved by HUD on November 7, 1975. Under this contract and plans prepared by Hahn, Hahn will develop a 30-acre regional shopping center that will eventually include approximately 684,000 square feet of gross leasable space, three major department stores, a mall and parking facilities. One of the major tenants of the shopping center, Sears, Roebuck & Company, is presently operating a retail department store in the project area in a cramped and obsolete structure. Under the terms of Hahn's agreements with Sears, Hahn will construct the new store for Sears first. Because of the project delays caused by continued litigation, described below, Hahn was required to enter the site of the future Sears store before escrow could be closed on this parcel for certain preliminary site work for the Sears store, in order to meet its commitments to Sears. Under the severe time restraints imposed by those commitments, it was necessary for Hahn to use its own funds (not loan funds) to purchase a portion of the Phase II land in December 1978, to enable the construction of the Sears store to continue, even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract.

As your office is aware, since 1972, the project has been subjected to a series of lawsuits, totalling approximately

18, the majority of which have been financed in whole or in part by Codding Enterprises, owner and operator of competing shopping centers in the trade area. The decisions of the Agency, the decision of HUD and the efforts of the Agency to obtain financing for the project have routinely been attacked in court in a continual effort to halt the project. All of the lawsuits that were filed before October 18, 1978, have been resolved in favor of the Agency by the trial courts or have been dismissed. Appeals have been taken in five of the Codding-financed cases, resulting in one remand to the Agency for the making of necessary formal findings from the administrative record already compiled. The most recent lawsuit (as of the date of this letter) was filed on October 18, 1978.

Despite the continuous litigation, the Agency was able to sell $5,000,000 worth of Tax Allocation Bonds in 1977 by pledging the tax increments from other portions of the project. Project improvements to be provided by the Agency that are necessary prior to the sale of the Sears parcel to Hahn have been substantially completed. In apparent recognition that despite all efforts, the project has proceeded to a point enabling the sale of land to Hahn, Codding recorded a lis pendens covering the project property on February 27, 1978, three days after the Agency took action to authorize the sale of the Sears parcel to Hahn. On October 12, 1978, the court directed that an order be entered expunging this lis pendens. The following day, additional project opponents recorded a lis pendens covering another of the actions pending against the Agency. In the lawsuit filed on October 18, 1978, project opponents, for the first time to our knowledge in any of the litigation to date, requested among the relief sought a declaration that the action affected title to real property.

It is apparent to us and to Hahn that since any number of future lawsuits may be filled by different parties contesting project activities, the title to the project property may remain perpetually clouded, thus preventing Hahn from obtaining financing for the purchase of the land, notwithstanding the routine resolution of project litigation in favor of the Agency.

In order to stop this merry-go-round, the parties propose a sale of the land under an arrangement whereby title will pass to Hahn upon payment of the sale price into escrow, with provision for payment of the funds out of escrow to the Agency after the then-current lis pendens have been expunged. In the event that those lis pendens that are of record when title vests in Hahn have not been expunged by a certain date, the sale will be rescinded, the purchase price returned to Hahn and the land returned to the Agency free of liens and encumbrances, if any, created by the Developer's activities on the site.

We are informed that Hahn has explored this method of conveyance with potential lenders and that under the proposed escrow arrangement, Hahn anticipates that it will be able to obtain financing for the purchase of the land. Hahn has been unable to obtain financing from lenders for a purchase of the land without the escrow of the sale price as described. Discussions of this proposal with representatives of HUD indicate that a waiver of applicable provisions of the Contract would be necessary, particularly of Section 106(E) of Part II of the Terms and Conditions which provides:

> "(E) *Sales of Project Land to be for Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof."

We believe that under the proposed approach, substantial benefits will result for HUD, for the Project, for Hahn, and most importantly, for the people of Santa Rosa, who have waited several years for this Project to become a reality. Cost increases and loss in City and Agency revenues resulting from delay in the construction of the shopping center are substantial and are due to a number of factors including inflation of construction costs conservatively estimated at 10% per year, interest on our HUD temporary loan, repayment of which must be postponed until the land is sold to Hahn, administrative and legal costs caused by delay, loss of property taxes on the land that is awaiting sale to Hahn, and loss of sales tax revenues above current levels that will be generated by the shopping center.

The delay of the project is estimated to increase the cost to Hahn, the department stores and the mall shop tenants by approximately $13,700 per day, or over $410,000 per month. The cost to the City and the Agency is estimated to be $1,400 per day, or over $40,000 per month, for the HUD loan, administrative costs, legal fees and the increase in public improvement costs. When the loss of future municipal revenues are added, i.e. property taxes and sales taxes, the costs per day increase by $2,640, bringing the total public cost to $4,040 per day, or almost $125,000 per month. A major delay will also have other impacts. It will postpone the date when new construction and permanent jobs are made available to the community. An extensive delay could cause a default in the existing tax allocation bond issues.

Lastly, the approach outlined will benefit HUD because quite simply, it will enable us to repay the loan from HUD. Under the Contract, the HUD loan will not begin to be repaid, in effect, until the project land is sold. The sequence

of litigation and the succession of obstacles previously described has indicated that some form of special arrangement that differs from the conventional transactions contemplated by the terms of the Loan and Grant Contract may be necessary for the project to proceed. For these reasons, the Agency and Hahn have developed the arrangement outlined above as providing a practical solution of the difficulties encountered and we are requesting the necessary waiver at this time to permit the project to proceed.

We appreciate your time and attention in this matter and look forward to your early reply. If you have any questions or need additional information, please contact the undersigned.

Yours very truly,

REDEVELOPMENT AGENCY OF
THE CITY OF SANTA ROSA

JAMES K. BURNS
James K. Burns
Executive Director

JKB:mk

EXHIBIT "B"

JAN 25 1979

9.3CM-B

Mr. James K. Burns
Executive Director
Redevelopment Agency of the
City of Santa Rosa
P.O. Box 1678
Santa Rosa, CA. 95402

Dear Mr. Burns:

Subject: Project No. Calif. R-45
Santa Rosa Redevelopment Project
Request for Waiver

This is in response to your letter dated January 15, 1979 requesting a waiver of Section 106(E) of Part II of the Loan and Capital Grant Contract between HUD and the LPA which would allow title to most of the remaining project land to pass to the redeveloper upon deposit of the purchase price into escrow rather than at the usual close of escrow.

We propose to make a favorable recommendation to the Assistant Secretary for CPD on this waiver. However, before the Area Office forwards the request to Central Office for consideration, we should have in hand the actual escrow agreement proposed between the redeveloper and the LPA. Counsel for the LPA understands that HUD Area and Central Office legal and program staffs would have an opportunity to comment on this agreement and make revisions considered necessary as a condition precedent to approval of the requested waiver.

Please forward the draft escrow agreement at your earliest convenience.

Thank you for your cooperation.

Sincerely,

Original signed by:
G. Richard Schermerhorn

9.3CM-B.HALL:csf:1/24
9.3CM-B Hall
Chron
A.O. file

Robert P. Cunningham
Deputy Area Manager
Department of Housing
and Urban Development
Apr 9 1979
Area Directors Office
San Francisco, California

EXHIBIT "C"

Department of Housing
and Urban Development
Apr 9 1979
Area Director's Office
San Francisco, California

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys

April 6, 1979

Robert L. Cunningham
Acting Area Manager
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, California 94111

Re: Project No. Calif.R-45, Santa Rosa
Redevelopment Project, Request for Waiver

Dear Mr. Cunningham:

This firm represents the Redevelopment Agency of the City of Santa Rosa. Reference is made to James K. Burns letter to you, dated January 15, 1978, requesting a waiver of provisions of the Loan and Grant contract to permit a conveyance of property to the redeveloper and escrowing of the purchase price until certain *lis pendens* are expunged by the Agency, and your letter to Mr. Burns dated January 25, 1978, requesting a copy of the parties' escrow instructions for review by your office.

Enclosed is a copy of the Joint Escrow Instructions of the parties. If you have any questions, please feel free to

contact the undersigned. Thank you for your attention in this matter.

Very truly yours,

ALICE A. WOODYARD
Alice A. Woodyard

AAW:vlp
Enclosure
cc: David Sutton, Esq.
James K. Burns
Steve Watry
Richard B. Maxwell, Esq.
Edward Krasnove, Esq.
[all with enclosure]

EXHIBIT "D"

Received
Apr 27 1979
AS DEPT HUD
Area Counsel
Region IX

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys
April 25, 1979

David Sutton, Esq.
Office of the Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center
Suite 1600
San Francisco, CA 94111

RE: Project No. Calif. R-45, Santa Rosa Redevelopment Project, Request for Waiver

Dear Dave:

In accordance with our conversations on April 17 and April 23, I am enclosing copies of the following documents:

1. Specific Indemnity Agreement referenced in Section C-1 of the Joint Escrow Instructions. Counsel for the Redeveloper has approved this document.

2. Revised Joint Escrow Instructions adding requirement of public liability insurance. Counsel for the Redeveloper has approved of the revisions.

3. Pages 3, 4, 5 and 9 of the Joint Escrow Instructions showing changes in the prior draft.

This will also confirm for you that the Form of Special Warranty Deed used for this conveyance will be substantially the same as that used for the conveyance of the Sears Parcel. That Deed was approved by David Kroot of your office for the Sears conveyance. I will mail you a copy of the Deed that will be used for this conveyance.

Counsel for the Redeveloper is contacting the lender with regard to confirmation of plans to issue the letter of credit and to obtain a copy of a proposed form of letter of credit for your review. We will provide you with that material as soon as possible.

Please contact me if there are any questions or problems with any of the enclosed material.

Very truly yours,

ALICE

Alice A. Woodyard

AAW:vlp
Enclosures
cc: Robert L. Cunningham
James K. Burns
Steve Watry
Richard B. Maxwell, Esq.
Edward Krasnove, Esq.

EXHIBIT "E"

Received
May 11 1978
US DEPT HUD
Area Counsel
Region IX

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
(A Professional Corporation)
Attorneys
May 10, 1979

David Sutton, Esq.
Department of Housing and Urban Development
One Embarcadero Center
Suite 1600
San Francisco, CA 94111

RE: Santa Rosa Center Project, Calif. R-45

Dear Dave:

Enclosed is a copy of the form of Special Warranty Deed that will be used for the conveyance of the balance of the property to Hahn. This form of Deed is submitted for your approval in accordance with the Loan and Grant Contract.

Minor changes have been made in the form of Deed that was approved by David Kroot of your office for the earlier conveyance to Hahn. For your convenience, a copy of the changed pages with changes underscored is enclosed. The change on page 3 has reference to the lien imposed to secure payment of the developer's contribution, the details of which transaction are still being worked out in the parties' Second Implementation Agreement. This Agreement will be submitted to your office for HUD approval prior to its execution.

When you have had an opportunity to review this form. please advise me as to whether the Deed is acceptable to HUD. Thank you.

Very truly yours,

ALICE
Alice A. Woodyard

AAW:kd
Enclosures
cc: James K. Burns
Edward Krasnove, Esq.
Richard B. Maxwell, Esq.

EXHIBIT "F"

May 15, 1979

Office of Area Counsel 9.H.

Ms. Alice A. Woodyard
McDonough, Holland, Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

Dear Alice:

Subject: Project No. Calif. R-45, Santa Rosa Redevelopment Project, Special Warranty Deed

The form of Special Warranty Deed which you submitted for HUD review by your letter of May 10, 1979, is acceptable for use in conveying the balance of the shopping center site to Hahn.

All previously submitted documentation with regard to the Redevelopment Agency's January 15, 1979, waiver request has been reviewed for legal acceptability and a draft waiver has been prepared along with a preliminary legal memorandum explaining the need for the waiver and recommendation that the waiver request be given favorable consideration once it has been fully documented.

A final legal recommendation on the waiver will be made once the Second Implementation Agreement and the pro forma letter of credit have been received and reviewed.

Please let me know if I can try to be of any further assistance in obtaining these last documents.

Sincerely,

Original signed by:
David L. Sutton
David L. Sutton
Deputy Area Counsel
bcc: 9.3S, AMO 9.36:SUTTON:gmm:5/15/79

EXHIBIT "G"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
Attorneys

June 4, 1979

David L. Sutton, Esq.
Office of Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center, Suite 1600
San Francisco, CA 94111

RE: Project No. Calif. R-45,
Santa Rosa Center Project

Dear David:

We are pleased to learn of the proposed favorable recommendation of the request by the Santa Rosa Redevelopment Agency for a waiver of Section 6(e) of the Loan and Grant Contract for the above referenced project and appreciate your very prompt action on this request. Enclosed is a copy of the draft Second Implementation Agreement referred to in the Joint Escrow Instructions which were previously submitted in connection with the waiver request.

You will note that the Second Implementation Agreement is in large part aimed at implementing the Redeveloper's agreement to make annual payments to the Agency, based on a formula relating to floor area in the shopping center and secured by a lien on the property, in order to partially compensate the Agency for reductions in tax increments resulting from the passage of Proposition 13.

The obligation of the Redeveloper just referred to will not commence until the Shopping Center is opened, and

thus these provisions of the Second Implementation Agreement should not be of significant concern to HUD, since they will become operative well after the project is closed out. Negotiation of this aspect of the Second Implementation Agreement has involved the major department stores, since those stores are directly interested in the outcome, and the Agreement is not yet in final form in this area.

The draft Second Implementation Agreement is submitted at this time in connection with your review of the Agency's request for a waiver of Section 6(e) of the Loan and Grant Contract. It is our intention to submit the final form of the Second Implementation Agreement for review by your office independently of your consideration of the Agency's request for a waiver. Except for the annual payment provisions, the Redeveloper and the Agency are substantially in agreement on the present language of the document. The following discussion of the Second Implementation Agreement relates to areas in which documents previously approved by HUD are being modified or affected by the Second Implementation Agreement, which you may wish to review in connection with the Agency's waiver request.

Your office has previously approved the Contract for Sale of Land for Private Redevelopment, and the First Implementation Agreement to that Contract. Among other modifications to the Contract for Sale of Land, the First Implementation Agreement postponed the Agency's obligation to refund the Redeveloper's Deposit from the time that the Redeveloper is ready to build to the time that the Certificate of Completion is issued, but required that the Agency pay interest at 8% per annum from the time that the Redeveloper is ready to build. The Second Implementation Agreement specifies that the Agency's obligation to

refund the Redeveloper's Deposit is conditioned upon the availability of project revenues available to the Agency after repayment of Agency indebtedness incurred with respect to the project. (This arrangement also is made applicable to the Agency's repayment of the Redeveloper's Cost Advance.)

The amended Schedule of Performance, Attachment "D, Amended-2", has not yet been prepared.

The arrangement contemplated in the Joint Escrow Instructions, whereby title will pass to the Redeveloper prior to the Agency's actual receipt of the purchase price in cash, is potentially in conflict with certain provisions of the Contract for Sale of Land; see, for example, Sections 1(b)(1) and 1(b)(5) of that Contract. Therefore, the Second Implementation Agreement (Section 16-1) modifies the Contract for Sale of Land to the extent necessary to permit conveyance to the Redeveloper in accordance with the provisions of the Joint Escrow Instructions.

I understand that you do not anticipate that it will be necessary to have the final draft of the Second Implementation Agreement in order to complete your review of the Agency's waiver request and make a final legal recommendation. As I indicated in our conversation on May 21, there are timing problems since that Agreement has not been negotiated to final form in the area of the annual payment provisions. I hope that this letter will be of some assistance in your final review of the waiver. It does not appear to me that the provisions of the Second Implementation Agreement are of major importance to HUD's determination on whether to grant the waiver. As I have indicated, we do intend to submit the final Second Implementation Agreement for review and approval independent of the waiver request.

I would like to thank you for all the time and effort you have devoted to this project. If there are any questions, please feel free to call.

Very truly yours,

ALICE

ALICE A. WOODYARD

AAW:t'p
Enclosure

EXHIBIT "H"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation

Attorneys
July 24, 1979

David L. Sutton, Esq.
Office of the Area Counsel
Department of Housing and
Urban Development
One Embarcadero Center, Suite 1600
San Francisco, CA 94111

Dear Dave:

Enclosed are the other deeds I mentioned to you and the parties' Second Implementation Agreement. Please advise us of HUD approval of the Second Implementation Agreement. As we discussed, I understand that you probably will not need to formally review the deeds.

Also, as we discussed, we are making a minor modification to page 2 of the Special Warranty Deed so that it may be used to convey certain easements of support to Hahn in addition to fee title to the main parcel. Please advise if this modification will cause any problem.

Very truly yours,

ALICE

Alice A. Woodyard

AAW:kfd
Enclosures

EXHIBIT "I"

McDONOUGH, HOLLAND, SCHWARTZ & ALLEN
A Professional Corporation
Attorneys

555 Capitol Mall, Suite 950
Sacramento, California 95814
Telephone 916 444-3900

ENCLOSURE MEMO

To: David L. Sutton
Re: HUD approval—Schedule of Performance:
Santa Rosa Redevelopment Agency

Enclosed is the revised Schedule of Performance which is to be attached to the Second Implementation Agreement. Also enclosed for your convenience is a copy of the Schedule of Performances which was approved by HUD as a part of the First Implementation Agreement of the parties, showing changes.

Date July 27, 1979

By ALICE A. WOODYARD
Alice A. Woodyard

EXHIBIT "J"

July 30, 1979

Office of Area Counsel 9.3G

Ms. Alice A. Woodyard
McDonough, Holland, Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

Dear Alice:

Subject: Project No. Calif. R-45, Santa Rosa
Second Implementation Agreement with
Revised Schedule of Performances
(Attachment "D Amended-2")

This letter will serve to formalize our telephone discussion of Monday, July 30, 1979, on certain prerequisites to conveyance of remaining project land from the Redevelopment Agency of the City of Santa Rosa to Earnest W. Hahn, Inc.

SECOND IMPLEMENTATION AGREEMENT

The Second Implementation Agreement and Revised Schedule of Performances which you submitted for HUD review on July 24, and July 27, 1979, respectively, are acceptable to HUD with the understanding that nothing in the second implementation agreement affects or modifies the "outer limit clause" found in Part J of the Joint Escrow instructions previously submitted to HUD in support of the Santa Rosa Redevelopment Agency request for Waiver of Section 106(E) of its loan and grant contract with HUD.

It is the understanding of HUD that the joint escrow instructions require payment of the purchase price to the Agency in any event no later than the opening of any portion of the shopping center. This obligation is in no

way dependent upon or tied to the definition of opening contained in Section 13-9 of the Second Implementation Agreement for the purposes of that agreement.

EASEMENT AND QUIT CLAIM

There is no need for further HUD review of or concurrence in the submitted easement deeds or quit claim deeds from the Redevelopment Agency to the City of Santa Rosa. Provision for such conveyances necessary to project implementation is covered under Section IV of the original HUD approved Cooperation Agreement of December 20, 1961, as amended, between the Agency and the City.

GRANTING OF WAIVER REQUEST

After due deliberation, much discussion, and undoubtedly after careful review of the joint escrow instructions and other supporting documents drafted and negotiated by you, Assistant Secretary Embry has authorized the Section 106(E) waiver originally requested by the Redevelopment Agency on January 15, 1979. A duplicate original of the executed waiver will be transmitted directly to the Agency by separate letter.

Your long-suffering personal efforts have been instrumental in finally obtaining the waiver. It has been a pleasure to work with you.

Sincerely,

Original signed by:
David L. Sutton
David L. Sutton
Deputy Area Counsel
9.3G:SUTTON:gmm:7/30/79

EXHIBIT "K"
7/31/79

G.3G

Office of the Area Manager
Redevelopment Agency of the City of Santa Rosa
Post Office Box 1678
Santa Rosa, California 95402
Attention: Mr. James K. Burns
Executive Director

Gentlemen:
Subject: Project No. Calif R-45
Waiver No. 3 to Contract No. Calif. R-45(LG)

Enclosed you will find an executed duplicate original Waiver No. 3 by which the Government waives Section 106(E) of the subject loan and grant contract to the extent necessary to allow conveyance of certain project land prior to payment by the redeveloper, but only upon deposit into escrow of an irrevocable unconditional letter of credit in the full amount of the purchase price.

Please understand that the waiver is of no force and effect unless and until the letter of credit has been placed into escrow.

We congratulate you on coming another step closer to both physical completion of the project and financial settlement of the outstanding Project Temporary Loan.

Sincerely,

/S/
Paul R. Kaup
Deputy Area Manager
9.3G:SUTTON:gmm:7/30/79

WAIVER NO. 3
TO BE ATTACHED TO CONTRACT NO. CALIF. A-45(LG) BY AND BETWEEN THE UNITED STATES OF AMERICA AND THE URBAN RENEWAL AGENCY OF THE CITY OF SANTA ROSA.

WHEREAS, the United States of America (herein called the "Government") acting by and through the Secretary of the Department of Housing and Urban Development, has entered into a loan and capital grant contract (herein called the "Contract") with the Urban Renewal Agency of the City of Santa Rosa (herein called the "Local Public Agency") dated the sixth day of June, 1962 and Numbered Contract No. Calif R-45(LG) under and subject to the terms and conditions of which the Government has agreed to make a loan and grant to the Local Public Agency in connection with the project described in the Contract; and

WHEREAS, Section 106(E) of the Contract provides as follows:

> (E) *Sales of Project Land To Be For Cash*—With respect to all Project Land which the Local Public Agency sells, each such sale shall be for cash to be paid to it in full not later than the date of delivery of the instrument of conveyance thereof; and

WHEREAS, the Local Public Agency has requested that the above quoted contract condition be waived by the Government to the extent necessary to allow conveyance of title to all of the balance of the shopping center site in the project to Earnest W. Hahn, Inc., a California Corporation, (herein called the "Redeveloper") upon deposit into escrow of an irrevocable, unconditional letter of credit for

$1,140,000 in lieu of cash representing the total purchase price of such balance of shopping center site, with instructions to the escrow holder to pay the entire sum over to the Local Public Agency no later than the opening of any portion of the shopping center presently being constructed by the Redeveloper in the Calif. R-45 project area; and

WHEREAS, the Local Public Agency and the Government are deemed to be adequately protected against the possibility of the Redeveloper's failure to perform by the escrow instructions providing for recission of the conveyance and return of the balance of the shopping center site to saleable condition if the letter of credit is not honored upon demand made by the Local Public Agency; and

WHEREAS, it has been determined that the mutual interests of the parties to the contract would best be served if the above quoted provisions of the Contract were waived to the extent necessary to permit immediate conveyance of title to the balance of the shopping center site upon deposit into escrow of an irrevocable, unconditional letter of credit for the full purchase price:

NOW THEREFORE, the United States of America, acting by and through the Secretary of the Department of Housing and Urban Development hereby waives Section 106(E) of the Contract to the extent necessary to allow the Local Public Agency to convey title to the balance of the shopping center site to the Redeveloper upon deposit into escrow of an irrevocable unconditional letter of credit for $1,140,000 in lieu of cash representing the total purchase price with instructions to the escrow holder to pay the entire sum over to the Local Public Agency upon demand no later than the opening of any portion of the shopping center presently being constructed by the Redeveloper in the Calif. R-45 Project Area.

IN WITNESS WHEREOF, the Government has caused this Waiver to be duly executed this 31st day of July, 1979.

UNITED STATES OF AMERICA
Secretary of Housing and Urban Development

By: PAUL R. KAUP
Deputy Area Manager
San Francisco Area Office

EXHIBIT "L"

To Henry Dishroom, 10 Mgr., DHUD, SFAO
Attn: Salvatore P. Tedesco
BT
7/31/79

To: Henry Dishroom, Area Manager Date: 30 Jul 1979
San Francisco Area Office, 9.35
Attention: Salvatore P. Tedesco

From: Robert C. Embry, Jr., Community Planning and Development, C

Subject: Santa Rosa Center Redevelopment Project
Project No. California R-45
Request for waiver

We have reviewed the attached waiver form and other documentation proposed to be used in connection with the sale of project land. The sale would be made to the Redeveloper under an agreement for deposit of the purchase price of the parcel into an escrow account at time of settlement.

Section 106(E) of the loan and grant contract requires land proceeds to be paid in full to the LPA at the time of conveyance of title. Since the Santa Rosa Redevelopment Agency Escrow Arrangement provides an acceptable means of protecting the federal interest, the waiver is hereby granted.

The Department's authority to deduct block grant funds for loan payment under Section 112(A) of the Housing and Community Development Act of 1974 provides further assurance that the federal financial interest is being protected.

Therefore, in determining projected land disposition proceeds for Section 112(A) purposes, the sale proceeds should be excluded as project assets while escrowed.

Attached to this memorandum is the proposed contract with corrections noted by the Office of General Counsel with regard to the references to an unconditional irrevocable Letter of Credit.

/s/
Robert C. Embry, Jr.
Assistant Secretary
RT
NNNN
067 143 WL SML
Department of Housing and Urban Development
Jul 31 1979
Area Director's Office
San Francisco, California
SFAO Comm Center
31 Jul 1979 15 04
JD 212
Serial # 108

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 27, 1979, he served one copy of Plaintiff-Appellant's Motion For Judgment of Civil Contempt Upon Defendants-Appellees Pursuant to Rule 27, Federal Rules of Appellate Procedure and Points and Authorities in Support of Motion, on each party separately represented by the following counsel:

John J. Powers III, Esq.
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

G. Williams Hunter, Esq.
Paul E. Locke, Esq.
450 Golden Gate Avenue
Post Office Box 36055
San Francisco, Calif. 94102

Joseph E. Coomes, Jr., Esq.
Richard E. Brandt, Esq.
McDonough, Holland,
Schwartz & Allen
555 Capitol Mall, Suite 950
Sacramento, California 95814

William N. Willens, Esq.
Barrett, Stearns, Collins,
Gleason & Kinney
1150 Union Bank Tower
Del Amo Financial Center
Torrance, California 90503

by mailing said copies postage prepaid to the offices of said attorneys in accordance with the requirements of Rule 25, Federal Rules of Appellate Procedure.

RICARDO J. HECHT
Ricardo J. Hecht

Appendix P(2)

Received/Counter
Emil E. Melfi, Jr.
Clerk, U.S.C.A.
1979 Sep 27 PM 3:41
Filed.....
Docketed.....
Date Initial

In the United States Court of Appeals
for the Ninth Circuit

NO. 7-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION

William M. Brinton, Esq.
Ricardo J. Hecht, Esq.
Cotton, Seligman & Ray
1400 Alcoa Building
One Maritime Plaza
San Francisco, Calif. 94111
Tel: (415) 397-4600
Attorneys for Plaintiff-Appellant

In the United States Court of Appeals
for the Ninth Circuit

NO. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

POINTS AND AUTHORITIES IN
SUPPORT OF MOTION

I *The Acts and Conduct of Defendants-Appellees Constitute a Contempt of This Court*

Although no Court has issued an injunction against the transfer of possession and title to the urban renewal land the Appellees *know* that if Appellant succeeds in this appeal that such an injunction would issue. Under such circumstance the pending appeal is a "process" of this Court which is still alive, and which Appellees by their actions have resisted in violation of 18 U.S.C. 401(3). Such is the teaching of the [1] Court in *Griffin v. County School Board of Prince Edward County, Va.*, 363 F.2d 206 (4 Cir. 1966); cert. den. 385 U.S. 960. There the Appellee Board of Supervisors of Prince Edward County and its members disbursed public funds to private segregated schools while their right

to do so was under consideration by the Court of Appeals in connection with an appeal taken by the Plaintiffs-Appellants. Following the disbursement of the funds, the Plaintiffs-Appellants sought by motion a judgment of contempt against the Appellees, and a remedial order requiring the Appellees to restore the disbursed funds to the County. The Appellees attempted to defend against the motion on the argument that the power of the Court to punish for contempt is limited by statute to the violation of extant orders and decrees. The Court rejected the argument and found the Appellees guilty of contempt, and in explaining its ruling said (363 F.2d 210-212):

> "That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. In doing so the Board took upon itself to decide its right to exercise, in favor of the private school, the Board's general power to appropriate public funds. This use of power was, as the Board was acutely aware, an arrogation of this court's responsibility. Obviously, the aim was to thwart the impact of any adverse decree which [2] might ultimately be forthcoming on the appeal. In effect it was a 'resistance to its [this court's] lawful writ, process, order, rule, decree, or command'. 18 U.S.C. § 401(3). The authorities are quite clear on the point.
>
> "The Board would escape the judgment of contempt on the argument that the statute limits the power of the court to violations of orders or decrees then extant. But precedent does not so contract the statute or constrict its intent. Although this court had not issued an injunction against the appropriation of the moneys to tuition grants, the Board knew that if the plaintiffs succeeded this would be its ultimate decree as in fact

it became. That potential decree was thus then within the statute. Furthermore, the appeal was itself a 'process' which was alive at the time of the disbursement and was resisted by the disbursement.

"In Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 31 S.Ct. 295, 55 L.Ed. 320 (1911), a temporary injunction had been issued by a Federal District Court to prevent the destruction by a municipality of a public utility's poles and wires, located in the city streets under an authorized franchise. The suit was dismissed on jurisdictional grounds. However, for and during an appeal to the Supreme Court, the injunction was continued in force. On this review the dismissal was upheld. But before the mandate of dismissal had been issued or could issue, and in the period allowed for presenting an application for a rehearing, the City cut down the poles, destroyed a large section of the wires and thus put the utility out of business. This conduct was declared to be contempt of the Supreme Court, Justice Lurton saying at 535-536, 31 S.Ct. at 296:

> " 'It does not necesarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of [3] the appeal beyond its control, or by its destruction. This we need not decide, since *irrespective of any such injunction actually issued the wilful removal beyond the reach of the Court of the subject-matter of the litigation* * * [on] *appeal* * * * *is, in and of itself, a contempt of the appellate jurisdiction of this court.* * * * Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent.' (Accent added.)

"The contempt power declared in the *Merrimack* case was not suggested to be rooted in the inherent power of the Supreme Court rather than in the statute now embodied in 18 U.S.C. § 401(3). Incidentally, the Court has never excluded itself from the statute. Cf. Ex parte Robinson, 19 Wall. 505, 86 U.S. 505, 509, 22 L.Ed. 205 (1873). But *Merrimack* is not now cited to power. It is cited as warranting our finding that the putting of the subject-matter of this litigation beyond our reach was a defiance of this court, an anticipatory resistance to its ultimate orders or process.

"That inferior courts have the same contempt power as the Supreme Court exerted in *Merrimack,* and that similar conduct is contempt of the lower courts, were unequivocally enunciated in Lamb v. Cramer, 285 U.S. 217, 219, 52 S.Ct. 315, 76 L.Ed. 715 (1932). There, as in the case now on review, no injunction or order had been issued restraining disposition of the property in suit. Nevertheless, receipt and possession of a part of the res, pendente lite, by a transferee of the defendant-owner was adjudged a contempt of the trial court. The Court had no difficulty in concluding that there was contempt despite the absence of a current restraining order.

"While Lamb v. Cramer, supra, did not specifically mention the statute, the Court obviously did not think it barred prosecution of the transferee [4] for contempt. Essentially, the Court followed the statutory terms—'resistance to its [the court's] lawful writ, process, order, rule, decree, or command'—by not limiting its application to an immediately outstanding precept. The anticipated final judgment was not considered to be presently beyond the contemplation of the statute. Indeed, the contrary is implicit in the opinion. The diversion of the res was held to be contumacious because it 'tended to defeat any *decree* which the court *might ultimately* make in the cause.' (Accent added.)

"Civil and not criminal contempt was the gravamen of Lamb v. Cramer and is here too. This was a predominant consideration of the Supreme Court and probably accounts for no advertence to the contempt statute, which seems worded more appropriately for criminal contempt. The omission means nothing, for the primary reasoning of the Court was that the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court. Whether the decision in Lamb v. Cramer was founded on this conception of judicial custody or on the statute, of which the Court was hardly unaware, is immaterial. Either ground supports our holding that the Board of Supervisors was in contempt.

"The present case is quite different factually from Berry v. Midtown Service Corp., 104 F.2d 107, 122 A.L.R. 1341 (2 Cir. 1939), relied upon by the Board. There the subject-matter disposed of pending appeal was the leviable assets of the judgment debtor-appellant. The Court distinguished that case from ours when it said that the appeal was not 'defeated or impaired' by the defendant's assignment. Further distinction is found in its observation that the suit 'was not concerned with any specific property', the judgment on appeal merely establishing a general, personal, financial liability. [5]

"In our case the disbursement of the moneys seriously impaired the appeal. The suit and the appeal were directed to a specific subject, the Board's right to apply to a certain purpose moneys within its power. The Board assumed the right in utter and wilful disregard of this court's views. As was said in Merrimack River Savings Bank v. Clay Center, supra, 219 U.S. 527, 535, 31 S.Ct. 295, and again in Lamb v. Cramer, supra, 285 U.S. 217, 52 S.Ct. 315, such conduct constituted contempt although not formally and explicitly under the injunction.

"We find the Board of Supervisors and its members guilty of civil contempt. Accordingly, the Board and

its constituent individuals, . . . will be ordered jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions . . . ."

II In This Case The Court Has the Right and Power to Make Orders to Preserve The Status Quo, Irrespective of The Merits As They May Be Ultimately Decided

Where, as here, the defendants have notice of a suit brought to enjoin certain acts, the hands of the defendants are tied even though no injunction be issued, and they act at their peril and subject to the power of the Court to restore the *status quo, wholly irrespective of the merits as they may be ultimately decided.* This is the doctrine of *Jones v. Securities and Exchange Commission,* 298 U.S. 1, 80 L.Ed. 1015 (1936). In that case the Supreme Court said (298 U.S. 15-18, 81 L.Ed. 1020-1022): [6]

". . . The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued. We briefly review some of the decisions.

"In Daniel v. Ferguson [1891] 2 Ch. 27—C.A., suit had been brought to restrain defendant from building so as to darken plaintiff's lights. Notice of motion for a temporary injunction to be made upon a designated future day was served on the defendant. After receiving notice, the defendant put on a large number of men and proceeded with his building, running a wall up to a height of about 39 feet from the ground before the injunction was granted. The court, without regard

to the ultimate rights of the parties, held that the wall thus run up by defendant should be torn down at once, as an attempt to anticipate the order of the court. A like situation was presented in Von Joel v. Hornsey [1895] 2 Ch. 774—C.A. In that case, the evidence showed that defendant had repeatedly evaded attempts to serve him with process, and in the meantime had gone on with the building. Again, without regard to the ultimate rights of the parties, the court directed defendant to pull down that part of the building thus erected.

"The Supreme Court of Pennsylvania in several cases has followed the same rule. Clark v. Martin, 49 Pa. 289, 298, 299; Easton, S.E. & W. E. Pass. R. Co. v. Easton, 133 Pa. 505, 519, 19 A. 486; Cooke v. Boynton, 135 Pa. 102, 19 A. 944; Meigs v. Milligan, 177 Pa. 66, 72, 76; 35 A. 600; Fredericks v. Huber, 180 Pa. 572, 575, 37 A. 90. In Cooke v. Boynton, a bill in equity had been filed praying for a preliminary and perpetual injunction preventing defendants from interfering with a certain tramway of the plaintiff. Before a preliminary injunction was obtained, the defendants, on three separate occasions [7] had torn up the track which the plaintiffs had replaced. The third incident occurred while plaintiff was obtaining a preliminary injunction. The court said, 'The writ was served just as they had finished the work of demolition, and this coincidence is strongly suggestive of a race against the law.' The trial court had dissolved the injunction, in part on the ground that the act sought to be restrained had already been done, and that it was without power at that stage of the cause to restore the property to its former condition by mandatory injunction. The supreme court reversed. 'What we did in the Easton Case,' the court said, 135 Pa. p. 110, 19 A. 944, 'we will do here. We will restore the injunction without passing upon the merits of the case. They will be considered when it comes here upon final hearing.'

"In New Haven Clock Co. v. Kochersperger, 175 Ill. 383, 51 N. E. 629, the state supreme court held that the forced payment of a tax after the court has acquired jurisdiction of a bill to enjoin its collection may be restored by the court, even though no preliminary injunction was granted; and that such payment cannot be availed of as a defense upon the ground that the tax having been paid there is nothing to enjoin. The same court in Turney v. Shriver, 269 Ill. 164, 172, 109 N. E. 708, held the rule to be that 'where a bill for injunction has been filed and the court has acquired jurisdiction of both the person and the subject matter of the suit and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status. . . .' See also Konig v. Baltimore, 126 Md. 606, 627, 95 A. 478.

"The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly [8] irrespective of the merits as they may be ultimately decided. 1 High, Inj. 4th ed. § 5(a)."

On the basis of the foregoing, it is submitted that this Court may properly grant the remedial orders sought by Plaintiff-Appellant.

See also:

National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9 Cir. 1973);

People of Saipan v. United States Department of Interior, 502 F.2d 90, 100 (9 Cir. 1974), cert. den. 420 U.S. 1003.

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

By WILLIAM M. BRINTON

Dated: September 27, 1979. [9]

Appendix Q

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

ORDER DENYING
CONTEMPT JUDGMENT

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The court has considered the motion of plaintiff-appellant for judgment of civil contempt, filed September 27, 1979, together with the responses. The motion has no merit and is denied.

Appendix R

Filed Oct 26 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,

Defendants-Appellees.

ORDER CORRECTING OPINION

Before: WRIGHT and KILKENNY, Circuit Judges, and PFAELZER, District Judge.

The opinion heretofore filed on July 24, 1979 is corrected as follows:

The third full paragraph in column 1, page 2968 of the opinion as printed should be corrected to read:

> Although antitrust violations were not involved in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that case presents an analogous situation. The question there was whether citizens of one town had standing to complain of the zoning practices of a

neighboring town which tended to discourage the development of low income and minority residences. The Court stated that....

The clerk will make the correction on the original copy of the opinion on file.

Appendix S

Received/Counter
Richard H. Deane
Clerk, U.S.C.A.
1979 Oct 29 P.M. 3:38
Filed
Docketed .....

Docketed .....
Date ..... Initial .....

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR STAY OF MANDATE

William M. Brinton, Esq.
Ricardo J. Hecht, Esq.
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One Maritime Plaza
San Francisco, CA 94111
Tel: (415) 397-4600
Attorneys for Plaintiff-Appellant

In the United States Court of Appeals
for the Ninth Circuit

No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a municipal corporation, Urban Renewal Agency of the City of Santa Rosa, a public body, corporate and politic, and Ernest W. Hahn, Inc., a California corporation,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S MOTION FOR STAY OF MANDATE

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Plaintiff-Appellant respectfully presents this its application for, and moves the Court to enter, an order staying the issuance of mandate in this case under the provisions of 28 U.S.C. 2101(f), and pursuant to Rule 41(b) of Federal Rules of Appellate Procedure, on the ground and for the reason that Plaintiff-Appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the [1] United States for a review on-writ of certiorari of the decision and judgment rendered in favor of Defendants-Appellees and against Plaintiff-Appellant in this cause.

On October 26, 1979, the following orders of this Court were filed in the office of the Clerk:

1. Order denying petition for rehearing and rejecting suggestion for a rehearing en banc;
2. Order correcting second opinion;
3. Order denying motion for civil contempt judgment.

WHEREFORE, Plaintiff-Appellant moves the Court for an order staying the issuance of mandate herein pending the filing by it of a petition for certiorari in the Supreme Court and until the final disposition therein of this cause.

There is attached hereto in support of this motion the certificate of one of the attorneys for Plaintiff-Appellant.

Respectfully submitted,
WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY
By WILLIAM M. BRINTON

Dated: October 29th, 1979. [2]

CERTIFICATE OF COUNSEL

I am and have been ever since November 19, 1974, the date on which this action was filed in the United States District Court, Northern District of California, one of the attorneys of record for Plaintiff-Appellant, and as such I am entirely familiar with the facts and law involved in the action.

I hereby certify that it is the bona fide intention of Plaintiff-Appellant to make timely application to the Supreme Court of the United States for a writ of certiorari within the time provided by law. I also certify that I believe that there is merit in Plaintiff-Appellant's case, and that the judgment of the United States Court of Appeals, Ninth Circuit, should be reversed by the Supreme Court.

I hereby further certify that this motion for a stay of mandate is not filed merely for delay.

Dated: October 29th, 1979.

WILLIAM M. BRINTON [3]

Appendix T

Filed Nov 7 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit
No. 77-1017
DC CV 74-2429 WWS

City of Rohnert Park, a municipal, corporation,
Plaintiff/Appellant,

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Defendants/Appellees.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of William M. Brinton, Esq. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before November 30, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

EUGENE A. WRIGHT
United States Circuit Judge.
Judge Wright

DATED: San Francisco, Calif.

Appendix U

Filed Nov 9 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

The United States Court of Appeals
For the Ninth Circuit
No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

ORDER RECALLING STAY OF MANDATE

Before: WRIGHT, Circuit Judge

On November 7, 1979, there was filed an Order Staying Issuance of Mandate. Prior thereto, on November 5, there were filed but not yet forwarded to the panel the Objection of appellee Hahn and the Response of other appellees. The court having considered those responses,

IT IS ORDERED that the Order Staying Mandate be recalled and that the plaintiff-appellant have seven days within which to reply to the objections and to comment on the request that a substantial bond be required as a condition of a stay of mandate.

WILL WRIGHT
United States Circuit Judge

November 9, 1979

Appendix V

In the United States Court of Appeals
For the Ninth Circuit
No. 77-1017

City of Rohnert Park, a municipal corporation,
Plaintiff-Appellant,

v.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants-Appellees.

REPLY TO OBJECTIONS BY APPELLEES ERNEST W. HAHN, INC., CITY OF SANTA ROSA AND ITS URBAN RENEWAL AGENCY TO MOTION OF APPELLANT CITY OF ROHNERT PARK FOR A STAY OF MANDATE

On October 26, 1979, this Court denied Appellant's petition for rehearing and Appellant's suggestion for a rehearing in banc. On October 29, 1979, Appellant filed and served a motion for stay of mandate. Pursuant to said motion and on November 7, 1979, this Court made and entered an order staying issuance of mandate.

On or about November 2, 1979, Appellees Ernest W. Hahn, Inc., City of Santa Rosa, and Urban Renewal Agency of Santa Rosa served and presumably filed by mail objections [1] and response to Appellant's motion for a stay of mandate. These objections and this response included the affidavits of John M. Gilchrist and James K. Burns. Following the filing of said objections and response, and on November 9, 1979, this Court made and entered its

order recalling stay of mandate which, *inter alia,* grants Appellant "seven days within which to reply to the objections and to comment on the request that a substantial bond be required as a condition of a stay of mandate."

In their objections to Plaintiff-Appellant's Motion For Stay of Mandate, Defendants-Appellees Ernest W. Hahn, Inc., City of Santa Rosa and its Urban Renewal Agency, Appellee Hahn stated in part that ". . . such a stay may cause Appellee Ernest W. Hahn, Inc. irreparable injury by causing cancellation of the development and construction of the Santa Rosa Center Urban Renewal Project Regional Shopping Center...." As part of its objection, Appellee included an Affidavit of John M. Gilchrist, Senior Vice President, Development Division, of Appellee Ernest W. Hahn, Inc. The Gilchrist Affidavit claimed under oath, in part, that:

> "12. Any significant construction of the proposed Regional Shopping Center cannot take place until elimination of Notice of Pendency of this action from the aforesaid pro forma policy of title insurance."[2]

Notwithstanding this demonstrably false statement, Appellee Ernest W. Hahn, Inc., beginning in June, 1978, even before oral argument in this proceeding on December 4, 1978, began planning for and carrying out the construction of the 161,342 square foot department store for Sears Roebuck & Co., one of its partners in the Santa Rosa Mall project. See page 6 of Exhibit 6 to Deposition of Ernest W. Hahn and pages 2-5 of "Affidavit of John D. Flitner, Rohnert Park City Attorney," attached hereto and incorporated by reference. See also Exhibit K to Appellant's Motion For Judgment For Civil Contempt in which Appellee HUD, in a letter dated July 31, 1979 and addressed to James K. Burns, stated in part: ". . . We congratulate

you on coming another step closer to both physical completion of the project and financial settlement of the outstanding Project Temporary Loan."

Building Permit No. 6113 was issued to Sears Roebuck & Co. Owner on June 27, *1978*. It covered the main department store with an assigned value of $4,417,500. The contractor was and continues to be Ernest W. Hahn, Inc. What Mr. Gilchrist means by "significant construction" is unclear, but the Sears department store represents about 19% of the total project of 835,525 square feet. The entire Santa Rosa Mall is scheduled to open in "Spring 1981." See p. 14 of the Form 10-K filed [3] by Ernest W. Hahn, Inc. on May 29, 1979, with the Securities and Exchange Commission (SEC). It is believed that the Sears department store, a major component of the Santa Rosa Mall, will open in March of 1980. The cover page of said Form 10-K and pages 14 and 41 are attached hereto and incorporated by reference. Appellant requests that this Court take judicial notice of the same under the provisions of Section 201(d), Federal Rules of Evidence. It was filed on May 29, 1979, *seven days after* Appellant filed and served its Petition For Rehearing Under Rule 40, and Suggestion of Hearing In Banc Under Rule 35, Federal Rules of Appellate Procedure. Said petition was not determined by this Court until July 24, 1979. Page 41 of the Form 10-K states in part as follows:

> "Previously described litigation affecting Santa Rosa Mall (this proceeding, *inter alia*) has been resolved in favor of the Company...."

The quoted paragraph from said Form 10-K was correct as of May 9, 1979, but by May 29, 1979, Ernest W. Hahn, Inc. had constructive, if not actual knowledge of Appellant's petition filed on May 22, 1979. Accordingly, the quoted para-

graph is the assertion of a fact, of that which is not true, by one who has no reasonable grounds for believing it to be true. Additionally, it does not mention two other unresolved and pending cases as follows, both of which, if relief [4] is granted as prayed for, will have a substantial adverse effect on the Santa Rosa Mall Project: *Codding Enterprises, et al. v. Urban Renewal Agency of the City of Santa Rosa, et al.,* Nos. 79465, 79762, 84237, 81799 in the Superior Court in and for the County of Sonoma, and *Coalition for a Sensible Downtown Plan, etc., et al. v. The City of Santa Rosa, a municipal corporation and the Redevelopment Agency of the City of Santa Rosa, et al.,* No. 99840 in the Superior Court in and for the County of Sonoma. Nowhere does the Form 10-K mention that cross-appeals in an antitrust action are now pending in this Court—see No. 77-2465 Companion to No. 77-2474. Ernest W. Hahn, Inc. is both plaintiff and defendant in these actions, and one of them involved alleged violations of the Sherman Act by Ernest W. Hahn, Inc. in connection with the Santa Rosa Mall Project.

Notwithstanding, Appellee Ernest W. Hahn, Inc. now claims it is faced with the possible ". . . cancellation of the development and construction of the . . ." Santa Rosa Mall shopping center project. In fact, however, said Appellee could have moved at any time after October 13, 1978 (date lis pendens was filed) to expunge the same. The possibility of doing so was mentioned in open court on December 4, 1978, the date of oral argument in this proceeding. It is now too late in the [5] day for Ernest W. Hahn, Inc. to say that no "significant construction" can take place with the lis pendens still of record. See pages 3-4 of Objections by Ernest W. Hahn, Inc.

It is quite clear from the record in this proceeding that Appellee Ernest W. Hahn, Inc. and the Santa Rosa Appellees independently of any action by this Court, have gone forward with significant construction as part of the Santa Rosa Mall project. Ernest W. Hahn, Inc. purchased ". . . a portion of the Phase II land in December 1978 . . ." even though title was subject to two lis pendens and the Agency was technically and legally not in a position to convey clear title to the land as required by the Hahn contract. See Exhibit A to Appellant's Motion for Judgment for Civil Contempt—letter dated January 15, 1979, from James K. Burns to Robert L. Cunningham, Appellee HUD's Acting Area Manager, requesting a waiver of Section 106(e) of the Loan and Grant Contract to permit conveyance of the land in advance of cash payment by Appellee Ernest W. Hahn, Inc.

It is equally clear that Appellees intend to and will proceed with construction of the Santa Rosa Mall even though this Court does issue a stay of its writ of mandate. Private contractual and financial commitments amongst Appellees and finance institutions made during the pendency of [6] this and other proceedings now require Ernest W. Hahn, Inc. to proceed with construction under any and all circumstances.

Said Appellee Hahn, in going forward with substantial construction of a major component of the Santa Rosa Mall and making other related commitments, has acted at its own peril. *Jones v. S.E.C.* (1936) 298 U.S. 1, 56, 80 L.Ed. 1015, cited with approval by this Court in *People of Saipan v. United States Department of the Interior* (C.A. 9) 502 F.2d 90, 100 (1974). On page 90, this Court, quoting with approval from *Jones v. S.E.C.*, supra, stated in part:

> ". . . [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him (the precise relief requested by Appellant in this pro-

ceeding), even though a temporary injunction be not granted, *he acts at his peril* and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . . ." (Citations omitted and emphasis added . . . ."

Rule 41(b), Federal Rules of Appellate Procedure, state in part: ". . . A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate." Use of the word "may" suggests that the Court has discretion to condition stay of mandate upon a bond posted by Appellant, or not to require a bond at all.

It is Appellant's contention that Appellee Ernest W. Hahn, Inc., acting by counsel, has filed its objections [7] containing false statements of fact for the purpose of misleading this Court. Counsel for Ernest W. Hahn, Inc. must be presumed to know that (1) his client was required by law to file a Form 10-K, (2) it was filed and (3) the Appellant had filed or could file a petition for rehearing. Moreover, it has done so with knowledge that the same are false. See California Business & Professions Code, Sec. 6068(d), providing in part that:

"It is the duty of an attorney:

. . .

(d) . . ., and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. . . . ."

Counsel for Appellant has been unable to find any case in which a request for bond under Rule 41(b), Federal Rules of Appellate Procedure has been denied for violation of a duty owed the court. However, compare *Frausto v. Legal Aid Society of San Diego, Inc.* (C.A. 9) 563 F.2d 1324, 1327 (1977), particularly footnote 8 on page 1327. There, this Court stated in part:

". . . It is appellate counsel's professional duty to be scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief or oral argument. He must not mislead the court by misrepresenting the record. . . . ." (Citation omitted.) [8]

The attention of this Court is also called to the "affidavit of James K. Burns In Response to Motion For Stay of Mandate." In paragraph 5 thereof, he stated in part: ". . . A title insurance report prepared in connection with the conveyance of the shopping center property from the Agency to Hahn discloses that plaintiff-appellant has recorded a lis pendens based on this lawsuit. . . . ." This leaves the misleading impression that the Santa Rosa Appellees discovered the lis pendens only after obtaining a policy of title insurance. In fact, said lis pendens was filed on October 13, *1978,* and counsel for the Santa Rosa Appellees knew it on or about the same date. Counsel discussed expunging said lis pendens in open court on December 4, 1978, the date of oral argument in this proceeding. However, it was not until November 2, 1979, that counsel for the Santa Rosa Appellees asked for relief by way of expunging said lis pendens.

Moreover, Burn's wholly conclusory estimate of the cost of delay (See paragraph 10, pp. 5-6 of Burns Affidavit of November 2, 1979), is without evidentiary support, and he offers nothing which would qualify him as an expert witness. Nor has he been so brash as to say that, if called as a witness, he could testify competently to the matters stated in his affidavit. Cf. Rule 56(e), Federal Rules of Civil Procedure. [9]

In fact, Mr. Burn's sworn affidavit is in direct conflict with testimony of the Mayor of Santa Rosa. In *Codding Enterprises et al. v. Urban Renewal Agency of the City*

of Santa Rosa, et al., supra, the deposition of a Mr. Healy, the Mayor of Santa Rosa was taken under oath on August 2, 1979. In said deposition, the following exchange occurred on pp. 8-9 (Appellant requests this Court to take judicial notice thereof under Section 201(d), Federal Rules of Evidence:

> "Q. Has anyone ever told you that the City of Santa Rosa is currently losing any money because of any delay on the shopping center?
>
> A. (by Mr. Healy) Well, I've already said there is no delay as for today so I suppose the rest would follow.
>
> Q. Your answer is the city, to your knowledge, has not been losing any money?
>
> A. There is no delay so they couldn't lose any money because of that."

Although Mr. Healy may have limited his answers to the proceeding in which his deposition was taken, it seems clear that any alleged delay arising out of the lis pendens of October, 1978, is simply non-existent and without cost to Appellee City of Santa Rosa. It should be noted that counsel for the Santa Rosa Appellees was present at Mr. Healy's deposition, and must be charged with actual knowledge of the above-quoted exchange. The same counsel prepared objections [10] (containing the Burns Affidavit), to Appellant's Motion For Stay of Mandate.

Appellant respectfully submits that while no case can be found expressly so holding, Appellees are not entitled to a bond as a condition that this Court issue its order staying a writ of mandate. Instead of moving to expunge the aforesaid lis pendens, Appellees were engaged in a concerted and determined effort to "moot" this proceeding by placing the land and the Sears department store now almost completed thereon beyond the reach of this Court. See 18 U.S.C. 401(3).

For all the foregoing reasons, Appellant City of Rohnert Park moves this Court for relief as follows:

1. That it issue its order staying the writ of mandate in this proceeding;
2. That Appellant be given thirty (30) days from the entry of said order within which to file its petition for writ of certiorari in the Supreme Court of the United States;
3. That this Court overrule all objections to Appellant's Motion For Stay of Mandate;
4. That this Court reconsider Appellant's Motion For Judgment of Civil Contempt; and [11]
5. For such other and further relief as this Court deems appropriate in the premises.

Dated: November 16, 1979.

WILLIAM M. BRINTON
RICARDO J. HECHT
COTTON, SELIGMAN & RAY

By WILLIAM M. BRINTON [12]

In the United States Court of Appeal
For the Ninth Circuit

Case No. 77-1017

City of Rohnert Park, A Municipal Corporation,
Plaintiff and Appellant

vs.

Patricia Roberts Harris, as Secretary of the United States Department of Housing and Urban Development
Defendant and Respondent.

AFFIDAVIT OF JOHN D. FLITNER, ROHNERT PARK CITY ATTORNEY

JOHN D. FLITNER, of lawful age, deposes and says:

I am City Attorney for the City of Rohnert Park and have acted in that capacity since January, 1974. I reside in Sonoma County, near Santa Rosa, California, and my offices are in Santa Rosa, California. I have had occasion to view the site upon which Sears Roebuck and Company is constructing its new retail store, since construction was commenced on the site which is located within the Redevelopment Area of the City of Santa Rosa and which is part of the subject matter of the within [1] lawsuit. I pass by the site nearly every week on Third Street, which passes through the Redevelopment Area, or Fourth and Fifth Streets which formerly passed through the Redevelopment Area until they were closed within the last 30 or 60 days, respectively. By way of explanation, Fifth Street was closed some time after the middle of September, 1979, and Fourth Street was closed on or about the end of October, 1979. Both streets have now been torn up and demolished and are in the process of being integrated into the development plan for the Redevelopment Area.

I have observed construction at the Sears store commencing on or about the beginning of the construction season for 1979 and continuing forward thereafter. I have seen cranes at the site. I have seen forms erected for the pouring of concrete. I have seen the building being faced with brick and I have observed the roof and other outside material being applied. Attached hereto marked Exhibits 1-9, inclusive, are exhibits which relate to the issuance of permits for the Sears building or the Sears Tires, Batteries and Auto Service Center, which are explained as best I understand them, as follows:

1. Exhibit "1" is, so far as I can determine, the building, electrical, mechanical, plumbing, grading and encroachment permit for a new commercial building known as the Sears Retail Sales Building located within the Redevelopment Area. The owner is Sears, Roebuck and Co. and the contractor is Ernest W. Hahn, Inc. The permit was applied for on or about May 19, 1978 and [2] was issued on or about June 27, 1978.

2. Exhibits "2" and "3" are the front and back side of what I understand to be the worksheet utilized by the Building Department in conducting inspections on the Sears Retail Sales Building in the field. If one looks at Exhibit "3", one will note notations regarding the footings bearing such dates as October 18, 1978, October 20, 1978, October 25, 1978 and October 31, 1978. Alongside these dates are the initials of the inspector involved. There are other notations on Exhibit "3" indicating when the electrical was placed under the slab, when the main line plumbing was installed (10-28-78), when the underground electrical was installed for certain locations (2-27-79), and when other items within the inspection process were completed.

3. Exhibit "4" is the building, electrical, mechanical, plumbing and grading permit for a new commercial auto center store, tires and batteries and other accessories which was applied for on or about June 29, 1978. No date is shown as to when the permit was issued. Presumably, the permit would have been issued on or about the date the plan was received, which was indicated on Exhibit "4" as "1/1/79".

4. Exhibits "5" and "6" are the front and rear sides of the building inspector's work card and bear notations similar to Exhibits "2" and "3", only the dates are different. For example, underground electrical was inspected on

March 7, 1979 and the outside lath [3] was apparently inspected on August 23, 1979.

5. Exhibit "7" is a grading permit for the final site work for the Sears building. It was applied for on August 28, 1979, and was apparently issued on October 4, 1979.

6. Exhibits "8" and "9" are documents entitled *"RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT"* which were given by Ernest W. Hahn, Inc. or representatives of that company to the City of Santa Rosa. The two documents attached bear dates of June 27, and June 29, 1979.

Based on my observations of the activities of Ernest W. Hahn, Inc., and the Redevelopment Agency of the City of Santa Rosa and of the City of Santa Rosa, if at all involved in the construction work, these entities have not ceased the erection of the Sears building since the permit was issued and have continued as weather conditions would permit, to erect the building.

In addition to the foregoing I am involved in litigation presently on file in the Sonoma County Superior Court entitled Coalition for a Sensible Downtown Plan, etc., et al, plaintiffs vs. The City of Santa Rosa, a Municipal Corporation and the Redevelopment Agency of the City of Santa Rosa, et al, defendants, bearing Civil Action No. 99840. This action has been pending since October 18, 1978, and seeks to enjoin the defendants from closing Fourth and Fifth Streets at the boundaries of the project area. A Temporary Restraining Order [4] was issued in the case which was subsequently dissolved. The defendants have continued to work or to authorize work in the area of the streets to implement the plan in the face of the litigation and in the face of traffic studies which indicate that traffic levels will rise to D, E or F levels within the foreseeable future. The

apparent attitude of the defendants in that litigation is to proceed with the project as quickly as possible regardless of the consequences.

Dated at Santa Rosa, California, this 12 day of November, 1979.

JOHN D. FLITNER
John D. Flitner

State of California }
County of Sonoma } ss.

On November 12, 1979, before me, the undersigned, a Notary Public in and for said County and State, personally appeared John D. Flitner known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Notary's Signature LESLIE Q. HOLT

Official Seal
LESLIE Q. HOLT
Notary Public—California
Principal Office in
Sonoma County
My Commission Expires Jan. 27, 1981

General Acknowledgment
Form No. 16 [5]

TO APPLICANT: hand corner of the form before submitting.

city of santa rosa - PERMIT -

COMMUNITY DEVELOPMENT Department of

- BUILDING
- ELECTRICAL
- MECHANICAL
- PLUMBING
- GRADING
- ENCROACHMENT
- NEW / SFD
- ADDN / DUPLEX
- ALTER / APT.
- REPAIR / COMM.

PERMIT NO. 6113

JOB ADDRESS 100 Santa Rosa Center (100 ~~Fourth~~ Santa Rosa Center) LOT

OWNER: Sears, Roebuck & Co. — ADDRESS: 900 S. Fremont Ave., Alhambra, Ca. 91802 — TELEPHONE: 213 576-4802

CONTRACTOR: Ernest W. Hahn, Inc. — ADDRESS: 200 Continental Blvd, El Segundo, Ca. 90245 — TELEPHONE: 213 772-4200

CITY BUSINESS LIC.#: 41983 — STATE LIC.#: B159056 — ARCH./BLD. DESIGNER: Robert Clements and Associates — TELEPHONE: 213 627-0873

ENGINEER: Johnson & Nielsen — TELEPHONE: 213 256-2237 — LENDER: — APN: 10-062-21, 10-065-17

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
142,500 Gross	$1,417,500			
		FIRE ZONE	STORIES	BEDROOMS
	ZONING	USE PERMIT	DESIGN REVIEW	UBC ED.

PROPOSED WORK/REMARKS: Permit Fee subject to verification of contract price. RETAIL SALES BLDG.

NOTICE
Sewer connection and/or occupancy for this project may not be allowed until further notice due to action of the No. Coast Regional Water Quality Control Board.

MINIMUM OF 24 HOUR NOTICE FOR INSPECTION — CALL 528-5201

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH.			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND COMPLETE STATEMENT ON THE BACK OF THIS PAGE BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not.

X _____ APPLICANT'S SIGNATURE

PLAN CHECK FEE $2551.88	DATE 5/19/1978	RECEIPT # 29408	DATE PLAN RECEIVED 4-10-1978 (5-15-78) PLAN RECEIVED BY: WE
ADD'L PLAN CHECK FEE $ 856.76	DATE / / 19	RECEIPT #	☑ WORKER'S COMP. CERT. FILED. EXPIR. DATE 1/1/1979
PERMIT FEE $4600.50	DATE 10-3-78 6/27/78	RECEIPT # 29899	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 7655.64 EXHIBIT 4			DIRECTOR COMMUNITY DEVELOPMENT BY: X _____ DATE 6-27-78

city of santa rosa - PERMIT -

INSPECTORS WORK SHEET

- BUILDING
- ELECTRICAL
- MECHANICAL
- PLUMBING
- GRADING
- ENCROACHMENT
- NEW / SFD
- ADDN / DUPLEX
- ALTER / APT.
- REPAIR / COMM.

PERMIT NO. 11[illegible]

JOB ADDRESS 100 [illegible] Santa Rosa [illegible] — SUBDIVISION: [illegible] — LOT

OWNER: Sears, Roebuck & Co. — ADDRESS: 900 S. Fremont Ave. Alhambra, Ca. 91802 — TELEPHONE: 213 576-4[illegible]

CONTRACTOR: Ernest W. Hahn, Inc. — ADDRESS: 200 Continental Blvd. El Segundo, Ca. 90245 — TELEPHONE: 213 772-4200

CITY BUSINESS LIC.#: 41[illegible] — STATE LIC.#: [illegible] — ARCH./BLD. DESIGNER: Robert Clements and Associates — TELEPHONE: 213 627-0873

ENGINEER: Johnson & Nielsen — TELEPHONE: 213 256-2237 — LENDER: — APN: [illegible]

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
14[illegible]	[illegible]	V-2	1	I
		FIRE ZONE 1	STORIES	BEDROOMS
	ZONING C-2	USE PERMIT	DESIGN REVIEW	UBC ED. 3

PROPOSED WORK/REMARKS: [illegible]

6-27-78

EXHIBIT 5

TYPE OF INSPECTION	DATE	INSPECTION
FOUNDATION		
UNDERFLOOR/SLAB ELEC.		
UNDERFLOOR/SLAB MECH.		
UNDERFLOOR/SLAB PLUMB.		
UNDERFLOOR		
ELECTRICAL ROUGH		
MECHANICAL ROUGH		
PLUMBING ROUGH		
FRAME ROUGH		
LATH OUTSIDE		
INSULATION		
WALLBOARD		
MASONRY/FIREPLACE		
GAS SERVICE	5/25/79	GB
SEWER SERVICE		
ELECTRICAL SERVICE		
GAS APPLIANCE		
ELECTRICAL FINAL		
PLUMBING FINAL		
MECHANICAL FINAL		
BUILDING FINAL		
GRADING FINAL		
CERTIFICATE OF OCCUPANCY		

Partial Footing Inspection #1 at Submerger Electric Elec. Insp. Req. abg

10/13/78 abg

10/26/78 abg

10/31/78 GB

11/1/78 Elec. underslab North Hall abg

11/1/78 GB

11/1/78 Mech. underslab Roof abg

11/1/78 Plbg. underslab Roof abg

11/9/78 Elec. pit walls Beams across Telephone line trenches GB

11/9/78 Plbg. Roof

12/4/78 RTSwell

12/13/78 Elec. underground final GB

EXHIBIT 3

city of santa rosa - PERMIT -

department of COMMUNITY DEVELOPMENT

- [X] BUILDING
- [X] ELECTRICAL
- [X] MECHANICAL
- [X] PLUMBING
- [X] GRADING
- [X] ENCROACHMENT
- [X] NEW [ ] SFD
- [ ] ADDN [ ] DUPLEX
- [ ] ALTER [ ] APT.
- [ ] REPAIR [X] COMM.

JOB ADDRESS: 60 Santa Rosa Ctr | SUBDIVISION | LOT

OWNER: Sears, Roebuck & Co | ADDRESS: 990 S. Fremont Ave Alhambra, Ca. 91803 | TELEPHONE: 213 576-4[illegible]

CONTRACTOR: Ernest W. Hahn Inc. | ADDRESS: 200 Continental Blvd. El Segundo Ca 90245 | TELEPHONE: 213 772-4200

CITY BUSINESS LIC. #: 4183 | STATE LIC. #: 159056 | ARCH./REGISTERED: Robert Clemente & Assoc. | TELEPHONE: 213 627-0873

ENGINEER: Johnson/Wilson | TELEPHONE: 213 256-2237 | LENDER | APN

PERMIT NO.: 6164 | FLOOR AREA | VALUATION: $ 431,000 | GROUP | FIRE ZONE | ZONING | USE PERMIT | DES. REVIEW | UBC ED. | MAX. OCC. | STORIES | TYPE | BEDROOMS

PROPOSED WORK/REMARKS: Auto Ctr Store CTBA

NOTICE: Sewer connection and/or occupancy for this project will not be allowed until further notice due to action of the No. Coast Regional Water Quality Control Board.

MINIMUM OF 24 HOUR NOTICE FOR INSPECTION — CALL 528-5201

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH.			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND COMPLETE STATEMENT ON THE BACK OF THIS PAGE BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not.

x E.W. Hahn Jr
APPLICANT'S SIGNATURE

PLAN CHECK FEE $ 418.13	DATE 6 29 78	RECEIPT # 29949	DATE PLAN RECEIVED 11 1 1979 — PLAN RECEIVED BY: dh
ADD'L PLAN CHECK FEE $ 0	DATE	RECEIPT #	[X] WORKER'S COMP. CERT. FILED. EXPIR. DATE 1 1 1979
PERMIT FEE $ 836.26	DATE 6 29 1978	RECEIPT # B.P.V. 24611	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 1254.39			DIRECTOR COMMUNITY DEVELOPMENT — DATE — BY: X per Bill Ryan

(REV. 10/77) GB

EXHIBIT 4

DEPARTMENT COPY

city of santa rosa - PERMIT -

INSPECTORS WORK SHEET

X BUILDING
X ELECTRICAL
X MECHANICAL
X PLUMBING
X GRADING
X ENCROACHMENT
X NEW SFD
ADDN DUPLEX
ALTER APT.
REPAIR COMM.

PERMIT NO. -4

JOB ADDRESS		SUBDIVISION	LOT
OWNER		ADDRESS	TELEPHONE
CONTRACTOR		ADDRESS	TELEPHONE
CITY BUSINESS LIC. #	STATE LIC. #	ARCH./BLD. DESIGNER	TELEPHONE
ENGINEER	TELEPHONE	LENDER	APN

FLOOR AREA	VALUATION	GROUP	MAX. OCC.	TYPE
		FIRE ZONE	STORIES	BEDROOMS
	ZONING	USE PERMIT	DESIGN REVIEW	UBC ED.

PROPOSED WORK/REMARKS:

6-29-78

EXHIBIT "5"

TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION		
UNDERFLOOR/SLAB ELEC.		
UNDERFLOOR/SLAB MECH.		
UNDERFLOOR/SLAB PLUMB.		
UNDERFLOOR		
ELECTRICAL ROUGH		
MECHANICAL ROUGH		
PLUMBING ROUGH		
FRAME ROUGH	8-23-78	
LATH OUTSIDE		
INSULATION		
WALLBOARD		
MASONRY/FIREPLACE		
GAS SERVICE		
SEWER SERVICE		
ELECTRICAL SERVICE		
GAS APPLIANCE		
ELECTRICAL FINAL		
PLUMBING FINAL		
MECHANICAL FINAL		
BUILDING FINAL		
GRADING FINAL		
CERTIFICATE OF OCCUPANCY		

west wall foundation 3/9/79 okay
[illegible] 3/13/79 okay
underground electrical 3/15/79 okay
[illegible] 3/15/79 okay

3/30/79 S.E. Corner
Near Stairs
Underslab R/E
BB

EXHIBIT "6"

city of santa rosa - PERMIT -

BUILDING
ELECTRICAL
MECHANICAL
PLUMBING
X GRADING
ENCROACHMENT
NEW SFD
ADDN DUPLEX
ALTER APT.
REPAIR X COMM.

JOB ADDRESS: 100 S.R. PLAZA — SUBDIVISION — LOT

OWNER: ERNEST W. HAHN, INC. — ADDRESS: P.O. Box 1116, S.R. — TELEPHONE: 523-2882

CONTRACTOR: ERNEST W. HAHN, INC. — ADDRESS: P.O. Box 1116, S.R. — TELEPHONE: 523-2882

CITY BUSINESS LIC.: 4983 — STATE LIC.: 159156 — ARCH./BLD. DESIGNER: Bolles & Assoc. — TELEPHONE: 421-3030

ENGINEER: Richard C. Jayson — TELEPHONE: 415-342 1515 — LENDER — A.P.N.: 10-069-01

PERMIT NO.: 10356

FLOOR AREA

VALUATION: ~~175,000~~ 542,418

GROUP — MAX. OCC. — TYPE

FIRE ZONE: 3 — STORIES — BEDROOMS

ZONING — USE PERMIT — DESIGN REVIEW — UBC ED. 76

PROPOSED WORK: REMARKS
Final Site work - Sewers
- ALL WORK TO BE UNDER DIRECTION OF SOILS ENGR.

NOTIFY THIS OFFICE 24 HOURS IN ADVANCE FOR INSPECTIONS

TYPE OF INSPECTION	DATE	INSPECTOR	TYPE OF INSPECTION	DATE	INSPECTOR
FOUNDATION			GAS SERVICE		
UNDERFLOOR/SLAB ELEC.			SEWER SERVICE		
UNDERFLOOR/SLAB MECH			ELECTRICAL SERVICE		
UNDERFLOOR/SLAB PLUMB.			GAS APPLIANCE		
UNDERFLOOR					
ELECTRIC ROUGH					
MECHANICAL ROUGH					
PLUMBING ROUGH			ELECTRICAL FINAL		
FRAME ROUGH			PLUMBING FINAL		
LATH OUTSIDE			MECHANICAL FINAL		
INSULATION			BUILDING FINAL		
WALLBOARD			GRADING FINAL		
MASONRY/FIREPLACE			CERTIFICATE OF OCCUPANCY		

READ AND SIGN THE STATEMENT ON THE BACK OF THIS APPLICATION BEFORE SIGNING

I hereby certify and agree that all Ordinances of the City of Santa Rosa and the State of California will be complied with whether herein stated or not

X Ernest Taylor
APPLICANT'S SIGNATURE

PLAN CHECK FEE $ 226.13	DATE 5 25 1977	RECEIPT # 35110	DATE PLAN RECEIVED 5 25 1977 — PLAN RECEIVED BY: V.C
ADD'L PLAN CHECK FEE $ 226.13	DATE 19	RECEIPT # V	☐ WORKER'S COMP. CERT. FILED. EXPIR. DATE 3 / 1 1980
PERMIT FEE $ 1007.25	DATE 11 9 1977	RECEIPT # 35705	PERMIT FEE INCLUDES SEISMIC, MICROFILM AND OTHER FEES AUTHORIZED BY CITY ORDINANCE.
TOTAL FEE $ 1506.38			DIRECTOR COMMUNITY DEVELOPMENT BY X — DATE 11-4-77

(REV 10 77) 6x

EXHIBIT "X"

DEPARTMENT COPY

DEPARTMENT OF COMMUNITY DEVELOPMENT

RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT

In consideration of the matter set forth in the following paragraph and permission received from the City of Santa Rosa, its officers, agents and employees (hereinafter CITY), by Ernest W. Hahn, its officers, agents and employees (here-
(Applicant)
inafter INDEMNITOR), to conduct said activities, INDEMNITOR does hereby release, discharge, hold and save harmless the CITY from any and all liability, claims, or demands arising out of said activity of INDEMNITOR whether or not caused by negligence on the part of the CITY.

Description of activities:

INDEMNITOR hereby agrees in consideration of the CITY issuing a building permit prior to completion of plan check not to begin any work on the project covered by the building permit until the plan check has been completed and approved and a stamped set of plans has been released to INDEMNITOR by CITY. The subject building permit is void after 120 days from the date issued, unless INDEMNITOR has furnished written evidence, accepted in writing by CITY not later than the 120th day, that foundation constructed pursuant to the approved plans, for the subject project are physically in place. In the event that the building permit becomes void, a new building permit shall be required, including a new plan check, plan check fee, and building permit fee. The project shall be subject to any and all requirements which may be imposed by law at the time of the new permit application.

Should the CITY be joined or named as a party in any claim, suit, action or other legal proceedings, INDEMNI-

TOR hereby agrees to indemnify, hold harmless and defend or settle the same, paying all costs and expenses including attorney fees and reasonable defense incurred in connection therewith.

Signed at Santa Rosa, California, this 21st day of June, 1978.

? ? ? ? ? ?
200 Conteninaltal Blvd.
El Segundo, CA
Address

WITNESS: ROBERT G. DRIGGS
Address

APPROVED AS TO FORM
CITY ATTORNEY

BY .....

EXHIBIT "8"

RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT

In consideration of the matter set forth in the following paragraph and permission received from the City of Santa Rosa, its officers, agent and employees (hereinafter CITY), by Ernest W. Hahn Inc. its officers, agents and employees
Applicant
(hereinafter INDEMNITOR), to conduct said activities, INDEMNITOR does hereby release, discharge, hold and save harmless the CITY from any and all liability, claims, or demands arising out of said activity of INDEMNITOR whether or not caused by negligence on the part of the CITY.

Description of activities:
INDEMNITOR hereby agrees in consideration of the CITY issuing a building permit prior to completion

of plan check not to begin any work on the project covered by the building permit until the plan check has been completed and approved and a stamped set of plans has been released to INDEMNITOR by CITY. The subject building permit is void after 120 days from the date issued, unless INDEMNITOR has furnished written evidence, accepted in writing by CITY not later than the 120th day, that found constructed pursuant to the approved plans, for the subject project are physically in place. In the event that the building permit becomes void, a new building permit shall be required, including a new plan check, plan check fee, and building permit fee. The project shall be subject to any and all requirements which may be imposed by law at the time of the new permit application.

Should the CITY be joined or named as a party in any claim, suit, action or other legal proceedings, INDEMNITOR hereby agrees to indemnify, hold harmless and defend or settle the same, paying all costs and expenses including attorney fees and reasonable defense incurred in connection therewith.

Signed at Santa Rosa, California, this 29th day of June, 1978.

ERNEST W. HAHN, INC.
Signature of Applicant

Address

WITNESS: DONNA M. HELWIG
Address

APPROVED AS TO FORM
CITY ATTORNEY

BY .....

EXHIBIT "9"

Fee Received
May 29 1979
Office of Reports
Reproduction Services
Printed May 31 1979

E 811250
Securities and Exchange Commission
Washington, D. C. 20549
17914
Form 10-K

110

Annual Report Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934
For the Fiscal Year Ended February 28, 1979
Commission File Number 0-6040

ERNEST W. HAHN, INC.
(Exact name of registrant as specified in its charter)

California
(State or other jurisdiction of
incorporation or organization)

95-1897947
(I.R.S. Employer Identification No.)

200 Continental Boulevard, El Segundo, California 90245
(Address of principal executive offices) (Zip Code)

(213) 772-4200
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12 (g) of the Act:
Common Stock
$.66⅔ par value

The number of shares of the common stock of Ernest W. Hahn, Inc. outstanding as of February 28, 1979, was 4,828,119 shares.

Indicate by checkmark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

YES X NO

Regional Shopping Centers Under Construction. The following table sets forth information with respect to regional shopping centers being developed by the Company which were under construction as of May 15, 1979:

REGIONAL CENTERS UNDER CONSTRUCTION

Name	Location	Estimated Completion Date	Company's Equity Interest
Carolina East	Greenville, NC	Summer 1979	100 %
Prestonwood Town Center	Dallas, TX	Summer 1979	100 %
Westdale Mall	Cedar Rapids, IA	Summer 1979	58.12%
Sunnyvale Town Center*	Sunnyvale, CA	Fall 1979	50 %
Villa Westwood**	West Los Angeles, CA	Fall 1979	70 %
Clackamas Town Center	Portland, OR	Fall 1980	50 %
The Fashion Show	Las Vegas, NV	Fall 1980	25 %
Ogden City Mall*	Ogden, UT	Fall 1980	75 %
The Plaza Pasadena*	Pasadena, CA	Fall 1980	72.64%
Santa Monica Place*	Santa Monica, CA	Fall 1980	20 %
Santa Rosa Mall*	Santa Rosa, CA	Spring 1981	75 %
Mall of Memphis	Memphis, TN	Spring 1981	50 %

[14]

*Redevelopment project
**Specialty shopping center.

Item 5. LEGAL PROCEEDINGS

The Company and its joint ventures are parties to lawsuits which challenge the propriety of zoning permitting the development and construction of shopping centers or which seek to prevent construction of shopping centers on the grounds that such construction would violate certain zoning or environment-related regulations. These actions affect The Plaza Pasadena and Marin Mall, which are in the construction and development stages and scheduled to open in 1980 and 1982, respectively. At February 28, 1979, the Company's investment, and commitments to invest, in such projects aggregated approximately $6,511,000. See "Commercial Property Development—Regional Shopping Centers—Development Stage Projects" in Item 1—Business.

Previously described litigation affecting Santa Rosa Mall has been resolved in favor of the Company. Litigation affecting Clackamas Town Center has been concluded and, in connection therewith, the Company paid a cash settlement of $500,000.

In addition to the foregoing, the Company is a defendant in a number of lawsuits arising in the ordinary course of business.

Management believes that the above-mentioned lawsuits will not have a material adverse effect upon the Company's operations.

Appendix X(1)

The Sherman Act, 15 U.S.C. 1 et seq., and more particularly Sections 1 and 2:

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every

person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed gulity of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Appendix X(2)

The Clayton Act, 15 U.S.C. 12 et seq., and more particularly 15 U.S.C. Section 26:

§ 26. *Injunctive relief for private parties; exception*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Appendix X(3)

Administrative Procedure Act, 5 U.S.C. 551 et seq. and 5 U.S.C. 701, et seq., and more particularly Section 702:

§ 702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 706. *Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

....

(C) in excess of statutory jurisdiction, authority, or imitations, or short of statutory right;

(D) without observance of procedure required by law;

Appendix X(4)

The National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq., and more particularly 15 U.S.C. 1460(c)(4):

(c) "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Such undertakings and activities may include—

...

(4) disposition of any property acquired in the urban renewal area (including sale, leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan or as provided in section 1457 of this title;

Appendix Y

URBAN RENEWAL HANDBOOK
7214.1 REV
LAND MARKETING AND REDEVELOPMENT

Chapter 1

CHAPTER 1. INTRODUCTION

1. SCOPE. This issuance establishes policies and requirements applicable to the marketing, disposition and redevelopment of real property under all urban renewal projects and Neighborhood Development Programs, receiving HUD financial assistance under Title I of the Housing Act of 1949, as amended.
2. PURPOSE. This issuance has been prepared to (a) simplify, clarify, and improve the organization of existing policies and requirements, (b) place greater reliance on each Agency to manage its own day-to-day operations by minimizing the need for the Agency to obtain advance HUD concurrence in routine actions, and (c) orient HUD monitoring and evaluation activities toward actual Agency progress in achieving performance goals.
3. OBJECTIVES. Realization of the redevelopment contemplated by the Urban Renewal Plan is a principal objective of the urban renewal process. In seeking this objective, the Agency shall:
   a. Schedule and coordinate land marketing activities with land acquisition, relocation, demolition and the installation of site improvements, so that the disposition of land can be consummated and redevelopment can get underway as soon as the land is physically ready for development.
   b. Publicize the availability of sites, affording potential redevelopers the opportunity to make their interest known.

c. Conduct the disposal of project land in a fair and equitable manner that is open to public scrutiny.

d. Adopt effective methods to prevent redevolpers from speculating in project land.

4. DEFINITIONS. For the purposes of this issuance, the following terms have the following meanings:

a. *Agency*—This term means the particular agency to which HUD financial assistance is made available for a specific urban renewal project or Neighborhood Development Program. It is synonomous with term Local Public Agency (LPA) as used elsewhere in the Urban Renewal Handbook and Neighborhood Development Program Handbook.

b. *Fair Reuse Value*—This term means the fair market value of the property for its highest and best uses permitted under the Urban Renewal Plan. [1]

c. *Disposal for Public Use*—This term means a disposal to the Federal government, a State, a local government, any political subdivision thereof, any of their agencies or instrumentalities, or retention by the Agency.

d. *Disposal for Nonprofit Institutional Use*—This term means a disposal to a nonprofit scientific, educational, public health, public welfare, charitable, hospital or other eleemosynary institution, which will operate the redevelopment for a nonprofit institutional use, e.g., a hospital, church, library, school, or playground. Acquisition of land by a nonprofit institution for investment or resale is not considered a nonprofit institutional use. The nonprofit institution must be exempt from Federal taxation under the Internal Revenue Code.

e. *Critical Parcel*—This term means a parcel which must be redeveloped for a specified reuse in order to successfully accomplish the objectives of, and complete, the project.

5. MANDATORY REQUIREMENTS. Except where specifically designated as optional or advisory, or prohibited by State law, the policies and requirements of this issuance, 7214.1 REV, are mandatory. As used herein, the terms "may" and "should" denote optional and advisory provisions.

6. BUDGET DEFICIENCIES. HUD assumes no obligation to pay any share of a budget deficiency resulting when (a) the total cost of real estate services and related disposition expenses exceed the amount set forth in the approved project budget for such purposes, or (b) total land disposal proceeds are less than the estimated proceeds set forth in the approved budget. For specific details with respect to budget revisions, the Agency should refer to applicable program regulations or contact HUD.

7.-9. RESERVED. [2]

CHAPTER 2. REAL ESTATE SERVICES

10. ECONOMIC AND MARKEKT ANALYSIS STUDY (EMAS). An EMAS is required during the initial NDP action year except when all land is intended for institutional or public uses, or when HUD determines that the data and information at hand are clearly sufficient in amount, timeliness, validity, and detail as to make additional study for the proposed private development unnecessary. An EMAS shall be undertaken whenever doubt exists as to the absorption and the redevelopment potential of the land over a reasonable period of time. When marketability problems are fore-

seeable, land acquisition should be postponed until the EMAS results are known and evaluated. The EMAS shall be updated and revised as necessary. Detailed guidelines for preparing an EMAS are contained in Appendix 1.

11. LAND USE AND MARKETABILITY STUDY (LUMS). A Land Use and Marketability Study is similar to an EMAS. However, it is normally associated with the older conventional urban renewal projects, while the EMAS is associated with NDP's. For general details as to the scope of services and related procedural information for a LUMS, see Paragraph 10 above and Appendix 1.
12. TRANSIENT HOUSING STUDY. As required by Section 106(g) of the Housing Act of 1949, as amended, the Urban Renewal Plan for a conventional urban renewal project shall not permit the new construction of a hotel or other transient housing on project land, unless the need for such housing has earlier been established on the basis of an appraisal or market study, providing a competent independent analysis of the local supply of such housing. For disposals under the Neighborhood Development Program, such analysis and determinations as to the need for transient housing shall be made prior to the disposal.
13. PLATS AND LEGAL DESCRIPTIONS. If practicable, required land surveys or plats and legal descriptions should be prepared prior to obtaining the reuse appraisals. They should reflect the bearings and dimensions of each disposal parcel and each area subject to different land use controls or redevelopment requirements under the Urban Renewal Plan, be certified in accordance with local legal requirements, and be

suitable for filing in the land records of the locality. The plat should indicate existing and proposed easements and the outline and location of any structures. A certified tabulation, showing the area of each parcel in square feet, should be placed on the plat or attached to it. [3]

14. REDEVELOPMENT CONSULTANT. The scope of services and frequency of consultation to be provided by a redevelopment consultant will depend upon the nature of the disposal problems and may cover the following kinds of activities:
    a. Recommending specific land uses, controls and restrictions; correlating land uses with EMAS; analyzing impediments to land disposal in the Urban Renewal Plan and proposing appropriate solutions.
    b. Preparing and implementing a sales program, including sales brochures, direct mail solicitation, other forms of advertising and other methods of stimulating redeveloper interest; guiding the Agency in the use of real estate brokers, including basis for their participation and compensation; recommending administrative staff organization of Agency for carrying out its land disposal effort; and advising Agency as to the means for making the land attractive for sale.
    c. Interpreting and evaluating the EMAS, appraisals, market analyses, and other studies; preparing special studies; and recommending as to the need for additional studies or appraisals.
    d. Scheduling and coordinating land acquisition, relocation, demolition, installation of project improvements and supporting facilities, and other actions, in order to develop and maintain a market

and provide for orderly and expeditious disposition within the capacity of the market to absorb the land and the new facilities to be provided.

e. Advising on the choice of disposal methods; evaluating bidding documents and proposed forms of disposal agreements from the viewpoint of their effect upon the marketability of the land and the availability to developers of adequate mortgage financing.

15. USE OF REAL ESTATE BROKERS. If the Agency utilizes private real estate brokers to sell project land by means of open non-exclusive sales listings, it should widely publicize the availability of such listings. All brokers indicating an interest should be advised promptly and simultaneously as to new listings. If the Agency believes that the granting of an exclusive sales listing would measurably improve its disposition program, it may do so, if permitted by State and local law. The justification for the Agency's determination to grant an exclusive sales listing shall be fully documented in its files. **[4]**

a. *Eligibility of Broker for Commission.* To be eligible for a sales commission the broker must be employed by and represent the Agency through a clearly established arrangement, whether by written contract or other method deemed acceptable under the circumstances applicable to the specific sale and comply with the requirements of subparagraph b below. The Agency shall not pay a sales commission if any of the following circumstances applies:

(1) The sale property is for public or public housing reuse, or is sold to a public body.

(2) The broker or his agents or employees has an interest in the purchaser or is employed by the purchaser, whether by contract, salary, or other means.

(3) The Agency has employed the broker, or his employer or employee, to appraise the property for disposition purposes or provide consultant services involving the disposal of the property.

b. *Equal Opportunity Requirements.* The contract with the broker shall contain (or the broker shall certify to) the following requirements:

(1) *Equal Employment Opportunity* requirements contained in paragraph 8 of Form HUD-621B, Contract for Professional or Technical Services.

(2) *Equal Housing Opportunity* requirements as follows: "The Broker agrees that neither he nor any of his sales or rental personnel, employees, or others authorized to act for him will, in violation of Title VIII of the Civil Rights Act of 1968 (The "Fair Housing" Title of Public Law 90-284) or Executive Order 11063, decline to show or will discriminate in the sale or rental of any property now or hereafter listed with him.

"It is further agreed that the Broker will: (1) instruct his staff in the policies of nondiscrimination and applicable laws; (2) prominently display the Fair Housing Poster in all offices in which sale or rental activity takes place; (3) use the approved Equal Housing Opportunity logo, slogan, or statement in all

advertising in conformance with the Advertising Guidelines for Fair Housing. [5]

"The Broker agrees that noncompliance by him or any employee of his organization with the laws, executive orders, or regulations against discrimination in the sale or rental of any property or with the provisions of this paragraph (or certification) will be proper basis for barring the Broker from participation in the selling, renting or managing of properties in HUD-assisted urban renewal areas."

c. *Commission Rates.* Real estate commissions shall not exceed payments prevailing in the locality for equivalent services, except that in difficult marketing situations, HUD may, on a case-by-case basis, approve a fully justified request for higher rates. To be eligible as a project cost, such higher rates must be approved by HUD in writing in advance of payment. Commissions shall only be paid after the conveyance and shall be based on services actually rendered.

d. *Evaluation of Offers on Net or Gross Price Basis.* The Agency shall dispose of project land in a manner expected to produce the highest return to the project consistent with the requirements of the Urban Renewal Plan. Usually this means the evaluation of bids on the basis of net disposal proceeds (gross price less sales commission). However, when the Agency determines that the overall highest net return to the project is most likely to be obtained through the use of brokers who will

not participate adequately except on a gross bid award basis, the Agency may utilize this method if permissable under State law. In either event, for project budget purposes, sales commissions shall be treated as a disposition expense rather than a reduction in disposal proceeds.

16. SELECTION OF APPRAISERS AND CONSULTANTS.

a. *General.* Appraisers and consultants shall be selected on the basis of their qualifications to perform the particular services to be required. If the reuse appraisals involve difficult problems of marketability, the reuse appraiser should be qualified to provide the required market analysis as well as the appraisal. Economic and marketing consultants shall be throughly experienced in all phases of the redevelopment process, including real estate sales, financing, brokerage, construction, packaging, appraising, leasing, and sales promotion relating to the types of private reuses proposed in the Urban Renewal Plan. Selection need not be by competitive bidding unless required by State or local law. The Agency shall select its appraisers and consultants without regard to race, color, religion, sex or national origin. [6]

b. *HUD Selection Role.* If requested, HUD will assist the Agency in selecting appraisers and consultants and in preparing the scope of services to be provided under the contract. Advance HUD approval is required for appraisers of the reuse value of residential land to be developed under HUD housing programs.

c. *Consultant Employed with Other Public Agency.* Arrangements for paid consultation or other

assistance from a member of another public agency shall be made in accordance with Chapter 2 HUD Handbook 7217.1, LPA Administration, between the two agencies involved rather than directly with the public employee.

d. *Evidence Supporting Contracts.* Along with a copy of the contract itself, the Agency's files shall contain a full record of all actions with respect to its selection of an appraiser or consultant and its award of the contract, including:

(1) Resolution, motion, or similar action of the governing body of the Agency authorizing the contract.

(2) If more than one appraiser or consultant was considered, identification of all who were considered, summary of the bids or proposals received, and, if the low bid was not accepted the considerations which governed the selection of the contractor. If only one appraiser or consultant was considered, explanation of the basis for the selection.

(3) Statement of the actions taken to ascertain the prevailing rates in the locality for equivalent services, and the basis for the Agency's determination of the compensation provided in the contract.

(4) Signed statement by the contractor setting forth his technical qualifications and general experience for performing the services, specific experience in appraising properties of the type involved, his registration or license number if required by State or local law, and other information pertinent to establishing his professional qualifications.

e. *Clearance of Contractor.* The Agency shall not enter into any contract with an individual or firm whose name appears on the HUD-maintained list of debarred, suspended and ineligible bidders. When requesting clearance, the Agency shall furnish HUD the name and address of the proposed contractor, including that of any officer, partner, director, trustee, member of governing body, participant in a joint venture or other person holding an interest of more than 10 percent in the contractor. [7]

17. GUIDEFORM AGREEMENT FOR REUSE APPRAISAL SERVICES. Reuse appraisal contracts shall be prepared in accordance with Form HUD-324, Form of Contract for Reuse Appraisal of Redevelopment Sites. Prior HUD concurrence is required for any substantive changes in the provisions of this form. (If the Agency has any doubt as to whether HUD concurrence is required, it shall consult with the HUD Area Office.) If the Agency obtains any special market analyses or engineering reports on project land, they shall be made available to the reuse appraiser.

18. USE OF REUSE APPRAISER FOR OTHER REAL ESTATE SERVICES. The Agency shall ensure that its reuse appraiser is not permitted to act as a broker or redeveloper for land which he has appraised for disposition purposes for the Agency.

19. COMPENSATION. The fee for appraisal or other real estate services shall be in a lump-sum amount or separate lump-sum amounts for specified services, based upon the prevailing rates in the community for equivalent services. The fee shall cover all services, supplies, and expenses of the contractor. Compensation shall not be based upon the amount of valuation or

other findings of the contractor. Per diem compensation is permitted only for consulting or advisory services on an intermittent or temporary basis or for court testimony.

20.-21. RESERVED [8]

CHAPTER 3. DETERMINATION OF DISPOSAL PRICE

22. MINIMUM DISPOSAL PRICE. Unless sold for low- or moderate-income housing at the Section 107 valuation, or dedicated, as authorized for certain public purposes, urban renewal land shall be disposed of at a price not less than its fair reuse value. The fair reuse value shall reflect both the advantages created by the project and the requirements and limitations on land uses to be imposed on the redeveloper by the Urban Renewal Plan.

23. NUMBER OF APPRAISALS. Except as described in subparagraphs a, b, c, and d below, each disposal parcel must be appraised independently by at least one competent professional appraiser in private practice. If the fair reuse value of a parcel exceeds $25,000, at least two appraisals shall be obtained. If two or more appraisals are obtained, one may be performed by a competent Agency staff appraiser. These requirements assume that all such appraisals will be reviewed by a fully qualified real property appraiser as provided in paragraph 32.

a. If the parcel to be appraised is a fragment of vacant land not separately buildable in accordance with the urban renewal plan, one appraisal by a qualified appraiser in private practice or on the staff of the Agency is sufficient.

b. HUD shall, upon request from the Agency, determine the fair reuse value of property to be sold for low-or moderate-income housing under the Section 107 valuation. (See paragraph 24 below.) There will be no fee charged to the urban renewal project for such HUD appraisal.

c. If the parcel is fully (100%) eligible as a project improvement and dedicated in accordance with paragraph 29 below, it need not be appraised.

d. If the parcel is designated for single family residential reuse, its fair reuse value may be determined by HUD appraisal. When this method is utilized, the urban renewal project shall be charged the standard HUD-FHA appraisal fee.

24. SECTION 107 APPRAISAL OF SITES FOR LOW OR MODERATE-INCOME HOUSING. As described in paragraph 23b above, HUD will determine the value of property to be sold for low-or moderate-income housing under the provisions of Section 107 of the Housing Act of 1949, as amended.

a. *Definition of Section 107 Valuation.* The Section 107 valuation is the maximum price that would be paid for the property by a well-informed, prudently acting buyer, who is motivated solely by the objective of meeting the housing needs of low-or moderate-income families or individuals, rather than by profit or gain, [9] and who is not controlled or directed or influenced in his decisions, by persons or firms seeking to derive profit or gain from the undertaking.

b. *Objective.* The objective of the valuation analysis is to estimate the price for the project property that would be equally as attractive to the assumed

kind of buyer as the most attractive available purchase of a substitute or alternative property, suitable for the same purpose.

c. *Location of Alternative Sites.* Each alternative property to be considered must be in a location which is suitable for serving the low-or moderate-income families or individuals of the community. Where the jurisdiction in which the buyer may purchase a site is limited, the location of the comparison sites shall be similarly limited.

d. *Recent Sales and Current Offerings.* The appraiser shall consider recent sales and asking prices, and the estimated current available market prices based on such data, for suitable alternative properties.

e. *Other Factors to be Considered.* In comparing the project site with suitable alternative properties, the appraiser shall consider, and make appropriate allowances for, among other things:

(1) Differences in the prices of the alternative properties.

(2) Differences in the cost of developing or rehabilitating the properties, whether the difference is attributable to location, topography, bearing quality of the soil, or other consideration (allowing appropriate adjustments for the impact of income taxes on development costs versus land payments).

(3) Differences in the costs of operating and maintaining the properties, after development.

(4) Appropriate differences in the degree to which the properties would serve the needs and desires of the prospective low-or moderate-income occupants or affect their other living

costs, such as transportation to place of employment. Such adjustments also must be justifiable in terms of the differences in rental payments and occupancy charges that would result.

f. *Factors Not to be Considered.* In comparing properties, the appraiser shall not consider:

(1) The availability of special financing, tax abatement, or other public subsidies for low-or moderate-income housing. [10]

(2) Any limits established for the maximum income of families or individuals eligible to occupy low or moderate income housing.

g. *Documentation in Appraisal Report.* The appraisal report shall contain the data, analyses and reasoning by which the appraiser reached his opinion of the Section 107 valuation of the project property. All assumptions of the appraiser with respect to changes to be made in the condition of the project property and with regard to project improvements and public facilities to be installed shall be stated in the appraisal report.

25. SALES SUBJECT TO REHABILITATION. The minimum disposal price for property to be disposed of subject to rehabilitation by the purchaser is the greater of (a) its fair reuse value or (b) 120 percent of the estimated fair reuse value of the land, if cleared. If the 120 percent test price is not obtainable, it is to be assumed that rehabilitation is not feasible. If the Agency believes there are special circumstances which warrant a waiver of this requirement, it shall submit its request, with justification, to HUD. Waivers will only be granted on a case-by-case basis. (The 120 per-

cent rule does not apply to properties sold for low and moderate income housing in accordance with the provisions of Section 107, or to properties sold for restoration and maintenance by the purchaser for historic or architectural purposes.)

26. DISPOSAL PRICE FOR HISTORIC OR ARCHITECTURAL PURPOSES. The minimum disposal price for property to be disposed of for restoration and maintenance by the purchaser for historic or architectural purposes is its fair reuse value. The fair reuse value shall, of course, reflect both the advantages created by the project and the conditions and restrictions to be imposed upon the development and use of the property in accordance with the Urban Renewal Plan.
27. FAIR REUSE VALUE FOR PUBLIC OR NONPROFIT INSTITUTIONAL USE. The fair value of land to be devoted to a public or nonprofit institutional use shall be based on its value for the most suitable alternative private use or uses which are compatible with the land uses permitted by the Urban Renewal Plan for the remainder of the urban renewal area. If the characteristics of the parcel would make it undesirable for private development (e.g., highway right-of-way), the value shall be consistent with the private-use value of adjacent land having characteristics appropriate for private redevelopment.
28. DISPOSAL PRICE OF EASEMENTS FOR PUBLIC UTILITIES. An Agency may grant or reserve, without charge, easements in project land for public utility service lines required to serve project land. These [11] easements may be provided regardless of the eligibility of the service lines as a project improvement. However, any portion of a right-of-way for an easement in excess

of the requirements for the project (and any easement that does not serve the project) shall be sold at not less than its fair reuse value.

29. DISPOSAL PRICE OF LAND FOR PROJECT IMPROVEMENTS. The Agency may dedicate, without charge, the land or interest in land that is fully (100%) eligible as a project improvement, as determined in accordance with the provisions of RHA 7209.1, Site Preparation and Project Improvements. Land in excess of the amount eligible for project improvement purposes must be sold at not less than its fair reuse value. In addition, in the case of a project improvement park (or certain other project improvements), if the improvement is only partially eligible (a range of 10% to 80% based on relative benefit as determined in accordance with RHA 7209.1), the dedication benefits applied to the required land shall reflect the same ratio. For example, if the project improvement park is determined to be 40% eligible, the land for such park shall be sold at not less than 60% of its fair reuse value.
30. DISPOSAL PRICE FOR FEDERAL-AID HIGHWAY USE. As soon as the Agency learns that project land is to be included in the tentative right-of-way of a proposed Federal-aid highway project, it shall discontinue further site clearance work on such land until the State Highway Department (SHD) enters an agreement (see paragraph 45c) to reimburse the Agency for the cost of acquisition, as determined in accordance with subparagraph a below, for all project land which it subsequently acquires from the Agency as part of the right-of-way.
    a. *Land Not Cleared Prior to Highway Notice.* Except as provided in subparagraph b below all proj-

ect land required for a highway project receiving Federal financial assistance shall be sold to the SHD at its cost of acquisition to the Agency, including applicable settlement and clearance costs and relocation expenses as determined in accordance with the HUD Relocation Handbook, 1371.1 (REV). Costs attributable to parcels lying partly within the right-of-way shall be prorated on the basis of the ratio of land area in the right-of-way portion of the parcel to the total land area of the parcel, regardless of the location of improvements. (As an alternative to this parcel by parcel determination, the total cost of acquisition of the right-of-way may be determined by prorating acquisition costs on the basis of the ratio of land area in the right-of-way to the total land area of the project, or appropriate segment thereof, regardless of the location of improvements.) [12]

b. *Land Acquired and Cleared Prior to Highway Notice.* Project land which is acquired and cleared (or under contract for clearance) before the Agency receives notice of a Federal-aid highway project (either written documentation of its approximate location or a request for conveyance of the right-of-way) may be sold at its fair reuse value as approved mutually by the Agency and the SHD.

31. VALUE OF RIGHT TO REMOVE IMPROVEMENTS. If an existing building or other improvement is to be sold for removal to a site already owned by the purchaser, it shall be sold at its "value for removal at a purchaser's expense." A minimum of one appraisal or engineer's estimate by a professional in

private practice or qualified individual on the staff of the Agency or other public body shall be obtained. However, for a package disposal consisting of both a site in the project area and a structure for removal to such site, the provisions of paragraph 23 apply to the entire package.

32. REVIEW OF APPRAISALS.

a. *Evaluation by Reviewer.* The appraisals and related market analyses shall be reviewed by a competent staff appraiser or private professional appraiser under contract to the Agency. The review appraiser shall require the appraisers to make all necessary corrections in their reports, particularly those needed to ensure substantial consistency in factual data therein. The reviewer shall determine the acceptability and adequacy of the appraisal reports, including the data and analyses furnished by the appraisers to support their opinions of value and the correctness of their estimates. The review shall include an on-site inspection of the property and of comparable properties considered by the appraisers in deriving their valuations.

b. *Report of Reviewer.* If the reviewer finds the appraisal reports acceptable and properly documented, he shall determine for each parcel his opinion of its fair reuse value. Such value shall not be less than the lowest acceptable appraisal amount. The reviewer's findings shall be set forth in a written report which shall identify the appraisal reports reviewed and explain the basis for his conclusion as to the fair reuse value of each parcel.

33. CERTIFICATION OF FAIR REUSE VALUE.

a. *Acceptance of Review Appraiser's Determination.* The Agency shall study the review appraiser's fair reuse value determination and his report thereon. With respect to properties [13] for which the Agency accepts the reviewer's report and valuations, the governing body of the Agency shall adopt a resolution or motion, or an authorized official acting under a general resolution shall make a certification, which:

(1) Identifies each property by parcel number, square footage and proposed reuses.

(2) Specifies the amount established as the fair reuse value for each property.

(3) Certifies that the work of the appraisers and the review appraiser has been performed in a competent manner in accordance with State law and HUD policies and requirements.

b. *Disagreement with Review Appraiser's Determination.* If the Agency disagrees with the review appraiser's determination of the fair reuse value of a property, it shall submit to HUD all appraisal reports and related market analyses on the property, the report of the review appraiser, and a statement of the determination of fair reuse value proposed by the Agency and its justification therefor. HUD will then determine the fair reuse value of the property.

c. *Submission Requirements.* Promptly after the Agency establishes the fair reuse value of a parcel, it shall submit to HUD on a confidential basis, (1) a certified copy of the resolution, motion, or certification establishing fair reuse value, and (2) a list of all appraisal report valuations, applicable dates therefor, and names of the appraisers. If a certification by an authorized official is used, a copy of the general resolution authorizing such use, shall be filed with HUD.

34. UPDATING DETERMINATION OF FAIR REUSE VALUE.

a. *Current Appraisal Evidence.* The Agency's appraisal evidence shall be current at the time of the disposal. New appraisal evidence is required if any of the appraisals, upon which the determination of the fair reuse value has been based, would be more than 18 months old at the time of execution of the disposal agreement. New appraisal evidence is also required if there has been any significant change in the market, condition or proposed reuse of the property, or the Urban Renewal Plan. [14]

b. *Procedure for Updating Fair Reuse Value.* When appropriate, the Agency shall have its appraisals brought up to date or supplemented or it shall obtain new appraisals. New appraisal evidence shall be reviewed in accordance with paragraph 32 above, and the updated fair reuse value shall be established in accordance with paragraph 33.

35.-36. RESERVED. [15]

Appendix Z(1)

Z(1)

2. The dispersion of core functions will create a large economic loss in property values throughout the core and in tax revenues over many years to come. Many of the activities now centrally located will move out of the jurisdiction of the City. This dispersion will lead to losses in downtown business volume and local businesses will suffer.

3. A new downtown regional shopping center will offer a unique attraction not only to residents of Santa Rosa and its environs but throughout the entire regional trade area. It will insure that Santa Rosa remains as the focal point; the existence of two large shopping centers (including Coddingtown), complementing each other, will strengthen its attraction to shoppers from the hinterland and will be another advantage to be considered by all manner of visitors, by prospective in-migrants and by those who are seeking a new location for a plant or business. The creating of a downtown regional shopping center in Santa Rosa will deter plans for any other competing new center in the trading area for some years to come.

There seems to be little doubt but that a community cost-benefit analysis would reveal benefits so substantial and enduring as to not only off-set the possibility of a small difference in disposition proceeds which might accrue under another type of commercial use than a shopping center, but also justify a substantial public investment at this time to the extent necessary [7]

* * * * * * *

Z(1)

One more question with respect to the regional shopping center use of the subject property should be answered and clarified. If the regional center is an over-improvement of

the site involving substantial extra costs, could not the objectives be accomplished and the extra costs avoided through a less intensive development? A smaller center with perhaps two department stores and a smaller GLA might avoid the necessity for levating the structure and providing a parking structure on site. It is a clear answer that if the center were small enough, the extra costs could indeed be avoided. However, any development short of a regional center will fail in the accomplishment of the primary objective—the revival of the central core of Santa Rosa and the preservation of its now threatened role of the central place and focal point for the entire region. A smaller community center is unlikely to attract much attention outside of the city itself and will be ineffective in warding off the construction of one or more regional centers in other parts of the trading area. It is clear that now is the critical point in time for the creation of the proposed dramatic and highly functional regional center on the subject site. [9]

* * * * * * *

Z(1)

The prompt development of the Santa Rosa center will be a strong inhibitor of the development of any new center in the region. While the proposed Rohnert Park center is premature and not a serious possibility at this time, the actuality of the subject center would kill off any possibility of a major development in Rohnert Park for a long time to come.

Market Price Behavior

Introduction

Because the best evidence of market value is the record of prices which have been secured in the market for prop-

erties similar to the subject property, appraisers usually place major reliance upon "comparables", i.e., the record of recent sales of similar properties under similar market conditions. In the present case, it is literally true that no comparables can possibly be found; there are no centrally located tracts of 30 acres which have recently been sold in Santa Rosa. In fact, throughout the whole State, there is no record of a recent sale in a community comparable to Santa Rosa involving a similar tract for which the most probable and most productive use is a regional shopping center. But this fact does not mean that market price behavior is to be ignored nor that it is irrelevant as useful evidence. This appraisel presents evidence on land sales which fall into four categories. This evidence will now be summarized and presented with analysis and comments on its [24]

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Appendix Z(2)

Z(2)

FINAL ENVIRONMENTAL IMPACT STATEMENT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JULY, 1975.

G. ECONOMIC

Impact of project on Environment

The project will provide downtown Santa Rosa with 700,000 square feet of modern commercial space and adequate parking facilities. This, when combined with existing commercial areas, will reestablish downtown Santa Rosa as the principal retail center for Sonoma County.

The regional shopping center will attract many more shoppers into the downtown area, thus providing new customers for existing downtown merchants and providing them with an opportunity for economic expansion. Owners of older retail buildings will have an incentive to upgrade and remodel their existing facilities in order to compete with the new center and capture a share of the new customers. The new pool of customers in turn will provide the additional economic return that will make such rehabilitation a profitable investment.

The center will also strengthen the economic viability and promote expansion of firms which provide services to the retail stores existing in downtown Santa Rosa.

With upgraded stores and expanded supporting services some new retail uses can be expected to be attracted to the areas of downtown Santa Rosa outside the renewal project, providing further economic growth for the city.

The new shopping area will make downtown Santa Rosa a more attractive place to locate new offices because of the proximity of government and retail services in the renewal

project areas. Thus the project will tend to give downtown Santa Rosa a better balanced economic base.

Z(2)

The fully occupied shopping center should be able to absorb most of the needed growth of commercial space in Santa Rosa until about 1990. This will prevent overly intensive development of rural areas because of low land prices before there is the population in the adjacent area to support such development. This relates to the comments on prevention of urban sprawl more fully outlined in the Land Use Section.

While the structure is being built it will provide construction jobs over a period of 2 years, thus providing needed help for the construction industry in Sonoma County. The center will also create 1,000 permanent jobs in the retail sales field, and will also have some multiplier effect on the rest of the County's employment which cannot be precisely measured. [114]

Revenues from the shopping center will be used to provide free parking throughout downtown Santa Rosa thus allowing office and government as well as retail uses in the city to compete more effectively with rural and suburban centers that provide free parking by using cheap, previously undeveloped land.

The project, by reclaiming land previously in commercial uses, will bring the land in the area up to its highest economic use, as opposed to its previous underutilized state. And after the tax increments have been used to pay off project expenses, the City will gain a substantial benefit in increased property tax revenues.

The additional increase in sales and income tax revenues and personal income of Sonoma County residents further warrant the expenditure of public funds for redevelopment

of downtown Santa Rosa. Also, the secondary growth and improvements stimulated by the center will increase tax revenues from the downtown area.

Z(2)

Thus the regional shopping center will result in an economically strong central Santa Rosa that can effectively compete with outlying areas. [115]

Appendix Z(3)

Z(3)

TEACHERS INSURANCE AND ANNUITY
ASSOCIATION OF AMERICA

730 THIRD AVENUE, NEW YORK, N. Y. 10017
(212) 490-9000

March 18, 1976

Santa Rosa Associates,
a Limited Partnership
c/o Robert Campbell Company
10889 Wilshire Blvd.
Los Angeles, California

Gentlemen:

Your offer to sell and simultaneously leaseback, as well as your application for a leasehold loan, has been accepted and approved, and we agree with you as follows:

Purchase Provisions

1. Subject to the terms and conditions herein, and for the purchase price indicated, we agree to purchase and you agree to sell and convey to us or to our nominee, the land hereinafter described:

Property:

Location	N/E/C	U.S. 101 and 1st Street Santa Rosa, California
Plot Size	6.33 acres	

Purchase Price:

$3,000,000 or the value established in the appraisal required under this agreement, whichever is the lesser amount, absolutely net to us and payable upon delivery of the deed.

Z(3)

2. The delivery of deed is to take place on a date to be agreed upon but with not less than 5 days notice to us and on or before the expiration date hereof in our office or in escrow with the title insurance company issuing the

* * * * * * *

Interest Rate: 9¼% *Term:* 35 years

Repayment:

At a constant rate of 9.64% per annum, payable monthly, to be applied first to interest and the balance to principal.

Prepayment Privilege:

None during the first seventeen years following the commencement of amortization and then, in full, on any installment payment date thereafter, upon 30 days' prior written notice, with a premium of 5% on the amount so prepaid during the eighteenth year following commencement of amortization, declining ½ of 1% per annum thereafter to a minimum premium of 1%, which minimum premium shall continue thereafter to maturity.

Accumulations:

Deposit monthly, and without interest thereon, of prorata ground rent, taxes, assessments, and insurance premiums next due, all as estimated by us.

Exculpatory:

That in the event of default in the loan terms, the mortgage shall be foreclosed first and thereafter no claim, suit or action shall be filed on account of any deficiency under the Note.

Z(3)

Improvements:

The developer's portion of a two-level, enclosed mall regional shopping center containing 322,000 square feet of mall stores, 20,865 square feet of free standing buildings, a 91,788 square foot enclosed mall and 28,000 square feet of service corridors and management offices. The mall will connect with a 161,342 square foot Sears, Roebuck & Company department store and TBA, a 135,530 square foot R. H. Macy department store and a 75,600 square foot Mervyn's department store. The first two department stores will covenant to operate under their respective names for 15 years and an additional 5 as department stores. Mervyn's will sign a 30-year lease and will covenant to operate under its own name for 15 years and an additional 5 as a department store.

Paved Parking

Sufficient space for 3,675 cars including deck and surface parking and reciprocal rights over the entire center all in accordance with a Parking Agreement required herein, and, the rights,

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